INDEX.

	Page
Statement of the case	1
Action by the Territory to foreclose tax lien against 65 patented mining claims	1
Appellee's return of the property for taxation at valuation of $3,180	2
Adoption thereof by assessor of Cochise County	2
Action of Board of Supervisors increasing the assessment.	2
The "Andrews Law," Revised Statutes of Arizona, 1901, par. 3875-3876, text	3
Filing by the appellee of bill for injunction with tender of amount admitted to be payable	5
Action by district court on bill for injunction	6
Action by Territorial Supreme Court on same on appeal..	7
Attempted compromise and dismissal of bill for injunction.	7
Act 92, Laws 1903, forbidding such a compromise	7
Mandamus suit to compel the tax collector to bring this present suit	7
Grounds of decision of Territorial Supreme Court herein holding assessment rolls inadmissible in support of the complaint because of alleged substantial variances	8
Assignment of errors	8
Argument	..
Details of alleged variances in respect of names in the various schedules of the mining claims	11
Error of court below in holding variance in names Howell and Powell was material	13
I. There was no variance between schedule in complaint and duplicate assessment roll	14
Discrepancies in names of claims due to errors in transcribing do not constitute variance, but mere irregularity or misdescription cured by local statutes	15
Revised Statutes of Arizona 1887, ch. VIII, par. 2717 (section 91), text	15
Such curative statutes are liberally construed. Authorities	16
Revised Statutes of Arizona, 1901, title 62, ch. VIII, par. 3937 (section 106), text	16
Act No. 92, Session Laws of Arizona, 1903, text	17

Page

Such slight variances in the complaint are cured by Revised Statutes of Arizona, 1901, par. 1293 (section 84), text 17
Authorities 18
Established rule as to clerical and typographical errors in respect of variance..... 20
If any one could suffer by the discrepancies here, it would be not the appellee, but the Territory..... 20
II. Proof of raise in valuation of 8 claims in group of 65 assessed *en bloc* was sufficient in support of allegation that the valuation of the whole tract, or all the claims, had been raised..... 21
III. Under the circumstances the appellee is estopped from setting up that the revised assessment was not valid or that the description of the property was defective..... 26
IV. Question of overvaluation cannot be inquired into in this proceeding 28
First. No appeal was taken by defendant pursuant to Revised Statutes of Arizona, 1901, par. 3875..... 28
Second. Appellee resorted to equity, but did not pursue its remedy to judgment..... 29
Third. Revised Statutes of Arizona, 1901, par. 3875, negatives jurisdiction of court to consider questions of valuation in this proceeding. Authorities..... 29
Fourth. The actual value of the property is not pleaded. Authorities 29
Fifth. The allegation of fraud is insufficient in that it is too general and no valuation is pleaded as the basis of alleged overvaluation. Authorities..... 30
Revised Statutes of Arizona, 1901, par. 3872, text..... 30
Conclusion 30

ARIZONA STATUTES CITED.

Andrews Law (Revised Statutes, 1901, par. 3875-6), text..... 3
Revised Statutes, 1887:
Par. 2652, text..... 24
Par. 2676..... 25
Par. 2717, text..... 15
Revised Statutes, 1901:
Par. 1293, text..... 17, 18
Par. 3836..... 29
Par. 3872, text..... 30
Par. 3875, text..... 3

Page

Par. 3875 ..... 28, 29
Par. 3876, text 5
Par. 3900 25
Par. 3908 5
Par. 3937, text 16
Par. 3949 15
Act 92, Session Laws, 1903 ..... 7, 17
Act 92, Session Laws, 1903, section 105, text 17

CASES CITED.

A. & P. Ry. Co. *vs.* Yavapai Co., 21 Pac., 768 29
Auditor General *vs.* Stiles, 83 Mich., 463 30
Austin *vs.* Westchester Tel. Co., 28 N. Y. Supp., 77 30
Baker *vs.* Insurance Co. (Or.), 48 Pac., 699 18
Battles *vs.* Barnett (Tex.), 100 S. W., 817 19
Benton *vs.* Yurann, 55 Pac., 676 19
Bigham *vs.* Tinsley, 130 S. W., 506 19
Coffey *vs.* Hendricks, 66 Tex., 676; 2 S. W., 47 19
Copper Queen Con. M. Co. *vs.* Scribner, 71 Pac., 946 29
County of Cochise *vs.* Copper Queen Cons. M. Co., 8 Ariz., 221. 6, 7
Ensign *vs.* Barse, 107 N. Y., 329; 14 N. E., 400; 15 N. E., 401.. 16
Grant *vs.* Johnson, 73 Vermont, 268; 50 Atl., 1059 16
Grayson *vs.* Lynch, 163 U. S., 468 19
Haflin *vs.* Winkleman, 18 S. W., 433 19
Hamilton *vs.* Rosenblatt, 8 Misc. App., 237 30
Hatch *vs.* Insurance Co., 67 Cal., 122; 7 Pac., 411 18
Humbird Lumber Co. *vs.* Thompson, 83 Pac., 945 29
In re Lamb, 51 Hun., 633; 4 N. Y. Suppl., 858 16
Luddington *vs.* City of Escanaba, 115 Mich., 288; 73 N. W., 368. 16
Maish *vs.* Arizona, 164 U. S., 611 30
Mattingly *vs.* D. C., 97 U. S., 687 16
Mead *vs.* Haines, 82 Mich., 264 29
Montgomery *vs.* Carlton, 56 Tex., 361 19
Nash *vs.* Towne, 5 Wall., 689 19
Newyago Portland Cement Co. *vs.* Sheridan Twp., 137 Mich., 475; 100 N. W., 747 16
Pacific Postal Tel. Co. *vs.* Dalton, 51 Pac., 1073 29
Pape *vs.* Allis, 115 U. S., 363 19
Rothchild *vs.* Harris, 125 N. Y. Suppl., 41 19
Rickets *vs.* Crewdson, 79 Pac., 1042 30
Smith *vs.* Hard, 61 Vermont, 469; 17 Atl., 481 16
State *vs.* Love, 47 N. J. Law, 436; 2 Atl., 810; 49 N. J. Law, 235; 9 Atl., 744 16

	Page
State *vs.* Phillips, 137 Mo., 259; 38 S. W., 931	16
State *vs.* Saddler, 23 Pac., 799	29, 30
Territory *vs.* Gaines, 11 Ariz., 270; 93 Pac., 281	7, 31
Washington & G. R. Co. *vs.* Hickey, 166 U. S., 532	19
Williams *vs.* Board of Supervisors of Albany County, 122 U. S., 154	16

TEXT-WRITERS CITED.

Black on Tax Titles, pp. 175, 216	30
Black on Tax Titles, p. 219	30
1 Cooley on Taxation, 3d ed., p. 506	16
1 Cooley on Taxation, 3d ed., p. 534	20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 89.

THE TERRITORY OF ARIZONA AT THE RELATION AND TO THE USE OF J. N. GAINES, AS TAX COLLECTOR IN AND FOR THE COUNTY OF COCHISE, IN THE TERRITORY OF ARIZONA, APPELLANT,

vs.

COPPER QUEEN CONSOLIDATED MINING COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF ON BEHALF OF APPELLANT.

Statement of the Case.

This is an action brought by the Territory (now State) of Arizona to foreclose its tax lien against sixty-five patented mining claims of the Copper Queen Consolidated Mining Company, to the extent of $120,039.35, with interest, etc., as prayed in the original complaint filed in the District

Court of Cochise County, Arizona, February 12, 1908. This sum is the amount of taxes due from appellee upon levies made against its property for the year 1901.

During the taxing period of that year the appellee returned to the assessor of Cochise County, as required by statute, a list of its property subject to taxation, including in said list, as one tract, consisting of 636 acres, and at the lump sum of $3,180, the 65 patented mining claims herein referred to, each of said claims being designated by name in the list, but without separate valuation (Transcript, pp. 89-90). This list, including acreage and valuation, was adopted by the assessor of Cochise County, and was by him carried into the assessment roll for 1901. No other mining claims than the 65 referred to were returned by or assessed to the appellee for that year.

It appears, by comparing the list of claims as returned by appellee with the list as it appears in the assessment rolls and other tax records and in the complaint, that there are several variances affecting possibly, as the list appears in some of the records, five or six of the claims named, but, in so far as the "Duplicate Assessment Roll" is concerned, which roll contains the description and valuations of property as finally corrected and equalized, appellant contends that there is in reality no variance, the discrepancies being so trivial, as we shall later show, as not to merit consideration.

The Board of Supervisors of Cochise County, sitting as a board of equalization, added, after due notice, $3,464,895 to the total assessment of the Copper Queen Company, $3,260,000 of which was added to the valuation of the patented mines above referred to (Trans., pp. 118-119, folios 257-259). This raise, as will appear by the record last referred to, was apportioned to eight of the sixty-five claims returned, in amounts varying from $50,000 to $1,000,000 and included improvements on these eight claims. It should be borne in mind that all of the eight claims, the valuation of which was so raised, are described alike throughout.

On September 1, 1901, a statute known familiarly as the "Andrews Law" became effective in Arizona (Revised Statutes of Arizona, 1901, pars. 3875-6), which is as follows:

"3875. (SEC. 45.) Any person, firm or corporation who is dissatisfied with the amount of his, their or its assessment as fixed by the board of equalization may appeal from the action of said board to the district court of the county in which said board holds its sessions, on or before the twentieth day of September following the adjournment of said board. Appeals shall be taken by a written notice to that effect to the chairman or presiding officer of the board of equalization and served upon the clerk of said board in the same manner as a summons in a civil action: *Provided*, That no appeal shall be taken unless the appellant shall, before taking the appeal, pay to the county treasurer of such county the full amount of taxes levied and assessed upon the property of the appellant by the board of supervisors in accordance with the valuation of such property as fixed by said Board of Equalization, which payment shall be accompanied by a written protest addressed to and filed with such county treasurer, setting forth the reasons why the person, firm or corporation, making such payment, deems the amount of such assessment erroneous or excessive. At the time of such payment the county treasurer shall deliver to the party making the payment a receipt for the amount so paid, which receipt shall be served upon the clerk of said Board of Equalization, with notice of appeal, together with a copy of such protest. Unless such payment is made before the taking of such appeal, the appeal shall be dismissed. Immediately upon the service of such notice of appeal the clerk of the board of supervisors shall transmit such notice, receipt and copy of protest, together with a certified copy of the record of the proceedings of said Board of Equalization relating to the assessment of the person, firm or corporation taking such appeal, to the clerk of the district court of such county. For such services the clerk of the board of supervisors shall receive a fee of ten dollars, which shall be paid by the party ap-

pealing to said clerk at the time of the service of the notice of appeal, and unless so paid the appeal shall be dismissed. Upon the filing of said notice of appeal, and the certified copy of the records aforesaid, the clerk of the district court shall docket the appeal in the name of the appellant, as plaintiff, and the county, as defendant, and such appeal shall be heard by the court, without a jury, at its first session thereafter, unless both parties consent, in writing, to a continuance of such hearing. At such hearing the court shall hear evidence touching the actual cash value of the property assessed, and shall take into consideration its character, whether improved or not, its surroundings, and, if it be productive, the amount of its average annual yield, and from the evidence submitted shall determine the actual cash value of such property at the time of the assessment, and must render its decision at once unless both parties consent, in writing, to a longer time. The decision of the court shall be in writing, and a certified copy thereof shall be delivered to the board of supervisors, who shall cause the assessment roll to be corrected accordingly. Upon the hearing of such appeal it shall be presumed that the valuation of the property fixed by the Board of Equalization is correct, and the burden of proof shall be upon the party appealing to prove to the satisfaction of the court that such valuation is erroneous or excessive. If it be determined by the court that the amount of such assessment is excessive, judgment shall be rendered in favor of the appellant and against the county for the amount of taxes which the court determines to be excessive, with interest thereon at the rate of seven per cent per annum from the time of such payment, and the costs of the appeal, which shall be paid as other judgments against the county. If the court shall determine that the actual cash value of the property is greater than the valuation fixed by said Board of Equalization, judgment shall be rendered in favor of the county and against the appellant for the taxes due upon the value of such property as determined by the court in excess of the amount fixed by said Board of Equalization, which judgment shall, from the time of its rendition, be a lien upon all the

real and personal property of the appellant within the county, and execution may be issued to enforce said judgment as in civil cases.

"3876. (SEC. 46.) The intent and purpose of the foregoing section is to have all property and subjects of taxation fairly assessed, at the value which would be realized therefrom by cash sale, but not a forced sale thereof, in such manner as such property and subjects are usually sold, and for this purpose the power and authority conferred by the foregoing section upon the court shall be liberally construed. But said court is expressly prohibited from reducing the valuation of any property below the fair cash value of the property, or what the property would sell for cash."

This law had been passed by the legislature in March, 1901, and because of its provision that taxes must be prepaid before an appeal could be taken from valuations of property fixed by boards of equalization, it had become very generally known prior to September 1.

Taxes did not become delinquent at that time until the third Monday in December (Revised Statutes, 1901, par. 3908); therefore the appellee, Copper Queen Consolidated Mining Company, had from September 1, 1901, until September 20, 1901, within which to appeal, if it so desired, from the valuation fixed by the Board of Equalization July 17, 1901. We think this was ample time, and we are also convinced that having ignored this plain, adequate, and exclusive statutory remedy, a court of equity was not open to it. Nevertheless, one day prior to the time the "Andrews Law" took effect, the appellee filed a bill in equity in the District Court of Cochise County, tendering therein the sum of $14,132.12 as the total amount of taxes due by it for the year 1901 upon said mining claims and all other property included in the assessment hereinbefore referred to (Trans., p. 61, fol. 133). This sum represented the tax on the property of appellee at exactly the same valuations as fixed by the owner itself in its return heretofore referred to (Trans.,

p. 59, fol. 128; p. 61, fol. 131), plus an addition of $73,500 to the valuation of its stock of merchandise, which appellee in its bill admitted ought to be added "in order to equalize the valuation of merchandise." The bill admits the validity of the original assessment (Trans., p. 53, fol. 116); admits the ownership and correctness of the list of 65 patented mining claims as set down and assessed by the assessor; admits that it had made a sworn return of these mining claims as 636 acres at $5 per acre to the assessor (Trans., p. 59, fol. 128; p. 61, fol. 131); does not complain of any misdescription, lack of description or variances, or that the action of the Board of Equalization in raising its assessed valuations on eight of the claims comprising the 136 acres did not operate to raise the valuation of the whole tract of 65 claims making up the 636 acres; but only that the valuation fixed was too high as compared with other like property in the county and Territory—not that it exceeded the cash value of the property (County of Cochise *vs.* Copper Queen Consolidated Mining Company, 8 Ariz., 221, reading page 234).

Thereafter such proceedings were had that on December 23, 1901, the District Court of Cochise County rendered its findings of fact and conclusions of law to the effect that so much of the raise of $3,160,000 made on July 17 by the Board of Equalization as exceeded the sum of $358,895 was "arbitrary and capricious" and therefore fraudulent and void; that said Copper Queen Consolidated Mining Company had already paid to the county treasurer the sum of $14,133.12, "the amount conceded by it to be due for taxes for the year 1901," and thereupon decreed that the tax collector should be enjoined from collecting any further taxes from said company for the year 1901 in excess of the sum of $9,132.64, together with a penalty of five per cent for delinquency, making a total of $9,589.27 in addition to what had already been paid (Trans., pp. 63-64). In other words, the trial court in that case added to the original assessment $285,395, and $50,000 of this raise was upon the hoisting works and improvements on the "Silver Spray"

mine, one of the eight claims to the valuation of which the Board of Equalization had added materially at its July meeting (Trans., p. 65, fol. 141).

The County of Cochise in due time appealed from this judgment to the Supreme Court of the Territory of Arizona, which court reversed said judgment on the grounds, among others, that the record failed to disclose either a proper pleading or any proof of fraudulent overvaluation or any valuation of appellee's property in excess of its cash value—the statutory standard of valuations for taxation purposes (County of Cochise *vs.* Copper Queen, etc., *supra*).

The appellee, though it had initiated this action, did not see fit to press it after this reversal, but, on the contrary, on June 7, 1904, attempted to compromise the same (Trans., p. 68, fol. 146) by the payment of the further sum of $5,661.44, $5,000 of which sum was to satisfy costs, expenses, and attorneys' fees incurred by the county in said cause, and the balance, $661.44, was to go into the treasury of the county. It is not clear whether the compromise as proposed was ever accepted formally by the county, but the money offered was paid in, and the attorneys representing the county approved the deal (Trans., p. 68-69, fols. 147-150). On June 25, 1904, the plaintiff (appellee here) had moved the dismissal of the action, and the court granted the order (Trans., p. 68).

In the meantime the legislature of 1903 had passed a new law relating to the collection of delinquent taxes (Act 92, Laws 1903). The compromise above referred to was made in flat contravention of section 91 of that law; and, an action having been brought in the Supreme Court of Arizona to compel the tax collector of Cochise County to bring the present action, the court, in that proceeding, holding said compromise void, awarded the writ of mandate prayed for (Trans., p. 271, fol. 589; Territory *ex Rel.* Clark, Attorney General, *vs.* Gaines, tax collector, 11 Ariz., p. 270). Thereafter, in due time, pursuant to the mandate issued in

the Gaines case, *supra*, this action was brought. Judgment was for defendant in the trial court, and an appeal therefrom was taken to the Supreme Court of the Territory of Arizona, where the judgment of the trial court was affirmed (Trans., p. 271). The judgment of the Supreme Court was based, in substance, upon two propositions:

First. That although the appellee had returned its 65 patented mines *en bloc*, and had therefore waived its right to a separate assessment in tracts or parcels, the Board of Equalization of Cochise County, by raising the valuation of eight of said 65 claims, disregarded such return and "segregated" from the group so returned these claims and imposed thereon an additional assessment (Trans., p. 274, fol. 595 *et seq.*). Therefore the discrepancies between the list of claims in the complaint and the list as shown in the various assessment rolls rendered these rolls inadmissible on the ground of variance (Trans., p. 276).

Second. That proof of a raise in the valuation of eight claims out of a group of sixty-five returned *en bloc*, the complaint alleging a raise upon the entire sixty-five *en bloc*, was a substantial variance (Trans., p. 277).

A motion for rehearing was seasonably filed, and, being overruled, this appeal followed.

Assignment of Errors.

Comes now the Territory of Arizona, the appellant above named, and assigns the following as error committed by the Supreme Court of Arizona in the above-entitled action, to wit:

I.

The court erred in holding that there was such a variance between the complaint filed in the court below (as to the names of the sixty-five patented mining claims) and the assessment list, assessment rolls, delinquent list, and back-

tax book as rendered said assessment rolls and lists inadmissible in evidence, for the reason that the discrepancies were trivial, and that as said 65 claims were returned by the appellee *en bloc*, or as one tract, and it returned no other mining claims or group of claims that year, it was immaterial that there were such discrepancies, as the record shows, it being indisputable that the tract as a whole was positively identified by the description appearing on the assessment rolls and back-tax books.

II.

The court erred in holding that proof of a raise in valuation by the Board of Equalization of Cochise County of eight of the sixty-five claims assessed *en bloc* did not constitute evidence of a raise in the value of the entire tract, and that such proof therefore constituted a material variance, for the reason that the entire number having been returned by the taxpayer as one group, block, or tract it had waived its right to a separate assessment of each claim, and the legal effect of the action of the Board of Equalization in raising the valuation of eight of the 65 claims under such circumstances was to add to the valuation of the whole tract. The designation of the eight claims so raised, by name, amounted merely to the assignment of a reason by the board for raising the value of the whole tract.

III.

The court erred in holding that payment of the tax upon the valuation fixed in the original assessment would not render harmless the alleged errors and omissions made in transcribing the names of said sixty-five patented mining claims from list to book, and from the books to the complaint, for the reason that the payment of said original tax is a binding admission on the part of the company that the

original assessment was valid; and for the further reason that the record shows payments in addition to the tax upon the valuation of mining claims as originally fixed, and ignored by the court, to wit: (1) Under the judgment of the District Court of Cochise County, December 23, 1901, upon the addition of $50,000 to the value of "hoisting works and improvements on 'Silver Spray' mine" (Trans., p. 65), amounting at the tax rate of that year, $3.20 per hundred, to $1,600, and a like additional amount under the same judgment upon "buildings and other improvements," making a total additional payment on mining claims of $3,200. (2) Under the attempted compromise of June 7, 1904 (Trans., p. 78), $5,661.44, which sum, under the terms of said compromise, pursuant to appellee's own proposition, was to be applied solely to the tax on mining claims, and, to use the language employed by appellee in proposing said compromise, "which said sum, together with the sum already paid by said company into the treasury of said county, *at the valuation of five dollars per acre, returned by said company upon 65 patented mines, containing 636 acres, in the year 1901, makes the actual basis of valuation per acre of said patented mines in this compromise thirty-seven dollars and fifty cents.*"

IV.

The court erred in affirming the judgment of the trial court in said action and in refusing to enter judgment for the Territory as prayed in its complaint, for the reasons given in the preceding assignments.

ARGUMENT.

The Territorial Supreme Court based its holding of variance on a very careful and minute comparison of the list of the claims incorporated in paragraph IV of the complaint (Trans., p. 2), and the list contained in appellee's sworn return and in each of the various tax rolls. By this exacting comparison the Territorial Supreme Court found that the complaint differed from the original assessment roll in this:

The complaint names:

Dividend Wedge,
Howell,
Bell,
Isle,

all of which, it says, are omitted from the original assessment roll.

The complaint, it says, omits:

Dividend,
Wedge,
Powell,
Little Joker,
Sunrise,
Bell Isle,

all of which are included in the original assessment roll (Trans., p. 275).

In the same manner, the court found that the complaint differed from the duplicate assessment roll in that it names:

Howell,
Dividend Wedge,
Bell,
Isle,

And omits:

Powell,
Dividend,
Wedge,
Bell Isle,

all of which are included in duplicate roll (Trans., p. 276).

By the same process, the court found that the complaint differs from the delinquent tax roll in that it names:

Dividend Wedge,
Howell,
Silver Bear,

And omits:

Dividend,
Wedge,
Powell,

which are included in the delinquent tax roll (Trans., p. 276).

The court found that the complaint differed from the back-tax book in that it names:

Dividend Wedge,
Howell,
Silver Bear,
Bell,
Isle,

And omits:

Dividend,
Wedge,
Powell,
Bell Isle.

(Trans., p. 276.)

The Supreme Court of Arizona concludes that the discrepancies thus revealed constitute a fatal variance between the complaint and each of the tax records, thus rendering the tax records inadmissible in evidence. In this holding, it is our contention that the court committed error.

The court said (Trans., fol. 598, p. 275):

> "Disregarding the discrepancy in the naming of the "Dividend Wedge" and the "Bell Isle" as a mere matter of punctuation, and the writing of "Sun Rise" as a compound name, the error in the names "Howell" and "Powell" and the mention of the "Little Joker" claim in the assessment list is a ma-

terial variance which would render the assessment list inadmissible in proof of the allegations in the complaint."

We may assume, then, that the Supreme Court disregarded, as it should have done, the discrepancies in the naming of the three following claims:

Dividend Wedge,
Bell Isle,
Sunrise.

The court, however, held there was a material variance between "Howell" and "Powell."

In order that it may be made readily apparent that the discrepancy in naming this claim is merely a typographical error, the list of the claims as contained in the original return made by appellee (Trans., p. 89, "Exhibit A") is here referred to for the purpose of showing that the names of the claims in this list, as well as in all of the tax records (Trans., p. 112, "Exhibit C"; p. 128, "Exhibit F"; p. 138, "Exhibit G"), and the list in the complaint (Trans., p. 2, fol. 4), are arranged in alphabetical order. In each and every list the "Howell" or "Powell" is the 37th word, counting each and every word, regardless of punctuation, from the beginning of the list. In each and every case, whether named as "Powell" or "Howell," it falls in the "H's" and, without exception, between "Holbrook" and "Harrison."

It is apparent that "Howell" was intended rather than "Powell," and the circumstances are such that no one could be misled or injured. We submit that this does not constitute a material variance, but is at most a typographical error.

I.

There is no variance between the list in the complaint and the duplicate assessment roll.

The complaint conforms to the duplicate assessment roll save in immaterial discrepancies heretofore noted. The holding of the Territorial Supreme Court that the duplicate assessment roll was inadmissible in evidence to prove the allegations of the complaint was therefore unquestionably error.

It was error to exclude the original tax roll as evidence on the ground of material variance, for the reason that the variance is so slight as to be wholly immaterial and in no way prejudicial to the rights of the tax-payer, and for the further reason that the answer to the complaint, on which this action was tried, expressly admits that the lists of claims in paragraph IV of the complaint is the same, by words and figures, as the list contained in the original assessment roll (Trans., p. 25, par. IV, fol. 55), in the following words:

> "Answering paragraph IV of said complaint, the defendant denies that said assessor legally valued, listed and assessed in the tax list or assessment roll of said county for the year 1901, to and against said Cooper Queen Consolidated Mining Company, upon pages 55 and 56 of said assessment roll, or at all, any real estate; *but defendant admits that between the first Monday in February and the first Monday in June of said year said assessor placed upon the tax list or assessment roll of said county the words and figures as set forth in paragraph IV of said complaint, but denies that the same constitutes any assessment.*"

It was plainly error for the court to exclude all of the tax rolls on the ground of variance, as there is no variance between the duplicate assessment roll and the complaint, and because appellee's answer, as already shown, admitted that the list of claims in the complaint was in words and

figures the same as the list placed upon the original assessment roll by the assessor. It follows that any discrepancies between the complaint and the other tax records do not constitute variance between the complaint and said records, but an irregularity or misdescription, which is cured by statutes in effect at the time the rolls were made up, the lists transcribed from one to another, and at the time this suit was instituted and tried.

It is obvious that the complaint could not have been drawn so that the one list of the claims contained therein would conform exactly to each of the separate tax rolls. It was sufficient to make it conform to the list contained in the duplicate assessment roll.

The discrepancies between the assessment rolls are due to errors in transcribing, and, as such, inconsequential, because of curative statutes heretofore referred to and here set out in full:

Revised Statutes of Arizona, 1887, chapter VIII, par. 2717 (section 91), provides:

> "The entries made in the county treasurer's books, records of the board of supervisors, assessment roll, duplicate assessment roll and the warrants attached thereto, delinquent list and the proof of its publication, or a certified copy thereof, shall be *prima facie* evidence in all judicial proceedings and in all courts in this territory. *And no want of description or misdescription or irregularity in the description of the property assessed upon the assessment roll, if it can be ascertained or proved by any proper or competent evidence what property is intended, shall invalidate the assessment, but the same shall be sufficient and be considered valid both in law and equity.*"

This same statute was re-enacted in the Laws of 1901 (Revised Statutes of Arizona, 1901, chapter VIII, par. 3949, section 118).

Apparently the Supreme Court of Arizona rendered its decision without consideration of the statute just quoted.

That curative statutes are liberally construed in tax cases is now a recognized principle of construction:

Williams *vs.* Board of Supervisors of Albany County (1887), 122 U. S., 154; 7 Sup. Ct. Rep., 1244.

Mattingly *vs.* District of Columbia, 97 U. S., 687.

Luddington *vs.* City of Escanaba, 115 Mich., 288; 73 N. W., 368.

Newyago Portland Cement Co. *vs.* Sheridan Twp., 137 Mich., 475; 100 N. W., 747.

Ensign *vs.* Barse, 107 N. Y., 329; 14 N. E. 400; 15 N. E., 401.

In re Lamb, 51 Hun, 633; 4 N. Y. Suppl., 858.

Grant *vs.* Johnson, 73 Vermont, 268; 50 Atl., 1059.

Smith *vs.* Hard, 61 Vermont, 469; 17 Atl., 481.

State *vs.* Love, 47 N. J. Law, 436; 2 Atl., 810; affirmed by Court of Errors and Appeals, 49 N. J. Law, 235; 9 Atl., 744.

State *vs.* Phillips, 137 Mo., 259; 38 S. W., 931.

Cooley on Taxation (3d edition), chapter X, p. 506 and following, with cases cited.

Revised Statutes of Arizona 1901, Title 62, chapter VIII, paragraph 3937 (section 106), provides:

> "No assessment of property or charge for any taxes shall be considered illegal on account of any irregularity in the tax lists, assessment rolls, or duplicate assessment rolls not having been made, completed or returned within the time required by law, or on account of the property having been charged or listed in the assessment roll, without name, or in any other name than that of the rightful owner; and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof or the title acquired by the purchaser."

This chapter is amended by act No. 92, page 162, of the Session Laws of 1903. By that amendment paragraph 3937 (section 106) was untouched. We also respectfully refer to section 105, act No. 92, of the Session Laws, 1903, which provides:

> "No irregularity in the assessment roll, or omission from the same, or mere irregularity of any kind in any of the proceedings, shall invalidate any such proceeding, or the title conveyed by the tax deed, nor shall any failure of any officer or officers to perform the duties assigned him or them on the day or within the time specified, work any invalidation of any such proceedings, or of such deed, and no overcharge as to a part of the taxes or costs, and payment of such taxes or costs, shall invalidate a sale for taxes, except as to a part of the real estate sold to the proportion of the whole thereof as such part of the taxes and costs is to the whole amount for which land was sold. Acts of officers *de facto* shall be valid as if they were officers *de jure*, and if a deed would be valid as to the sale for any one tax it shall not be impaired by any irregularity, error in the proceedings or sale for any other tax or taxes."

According to the provisions of the statutes just quoted, the irregularities and discrepancies appearing in the tax rolls are rendered harmless and omissions are especially relieved against.

We respectfully submit that each of the statutes quoted is sufficient in itself to cure the shortcomings complained of in this case. We believe that the effect of all these statutes is to validate the rolls and harmonize them with the complaint beyond question. The complaint, conforming to one of the rolls, by virtue of the curative statutes, conforms to all of them sufficiently to render them all admissible in evidence in support of the allegations of the complaint.

If the complaint itself presents a slight variance from the tax rolls, this defect is rendered harmless by Revised Statutes 1901, par. 1293 (section 84), which provides:

> "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

In some instances a slight variance between the complaint and the proof offered might be very material. In such case a direct injury would result to the party against whom such evidence was allowed. In the case at bar the description, relating as it does to a tract assessed as an entirety, is amply sufficient to identify the tract assessed, and it has never been and cannot be contended that the appellee was deceived or misled or that any one could be deceived or misled as to the identity of the property.

A review of the authorities sustains this position and satisfies us that the Territorial Supreme Court erred in holding that the discrepancies upon which the rolls were rejected constituted material variance:

Baker *vs.* Insurance Co. (Or.), 48 Pac., 699.

> "The property insured is described in the policy as 'Situate on and confined to the premises now actually owned and occupied by the assured, to-wit: Lots 27 and 28, block 8, In *Harlington Addition to Mt. Tabor*, Multnomah County, Oregon', and it is described in substantially the same manner in the complaint; but the evidence shows that the premises upon which the dwelling was located are correctly described as *lots 27 and 28, in block 8, Harlem Addition to East Portland*, and it was further shown, over the objection of defendant, that there was no such place as 'Harlington Addition to Mt. Tabor'. Held no variance."
>
> Baker *vs.* Insurance Co., *supra*.

The opinion quoted refers to Hatch *vs.* Insurance Co., 67 Cal., 122; 7 Pac. 411, which holds that if enough of the description is correct to *identify the property* other portions of it which are erroneous may be disregarded when the question is merely what property was insured.

Battles *vs.* Barnett (Texas), 100 S. W., 817:

This case holds that the variance between the petition in a boundary suit describing a survey as No. 446, and proof that it was No. 436, was immaterial, where it appeared that the number stated in the petition was a clerical error.

Other decisions bearing out our contention are:

Coffey *vs.* Hendricks, 66 Tex. 676; 2 S. W., 47.
Montgomery *vs.* Carlton, 56 Tex., 361.
Benton *vs.* Yurann, 55 Pac., 676.
Haflin *vs.* Winkleman, 18 S. W., 433.

The last case relates to a purchase-money note which was set out in the petition. The note offered in evidence referred to a certain deed for description of the land, and stated that it was recorded in book 10, pages 219 and 220. The note, as set out in the petition, described the deed as being recorded in book 10, pages 419 and 420. The note sued on bore date of March 29th, 1883, and recited the execution of a deed of even date therewith, and the deed offered in evidence bore date of March 27, 1883.

Held, not a material variance.

Bigham *vs.* Tinsley, 130 S. W., 506.
Rothchild *vs.* Harris, 125 N. Y. Supp., 41.
Nash *vs.* Towne, 5 Wall., 689-704.

Mr. Justice Clifford, in delivering the opinion in this case, said:

> "No variance ought ever to be regarded as material where the allegations and proof substantially correspond."

This statement has many times been acquiesced in by this court:

Grayson *vs.* Lynch, 163 U. S., 468, 485; 41 L., 230.
Pape *vs.* Allis, 115 U. S., 363-373; 29 L., 393.
Washington & G. R. Co. *vs.* Hickey, 166 U. S., 532; 41 L., 1105.

In view of the general trend of the decisions that a variance, unless it amounts to a failure of proof, or is misleading to defendant, ought never to be regarded, the holding of the Territorial Supreme Court was erroneous. So far as appellant is able to find, after a careful and painstaking search, clerical and typographical errors have never, save in this one instance, been held to constitute a material variance.

The situation now under consideration is discussed in the third edition of Cooley on Taxation (vol. 1), page 534:

> "Of the errors that creep into the records of tax proceedings very many are merely clerical, or occur in consequence of a failure to put in proper form the evidence of transactions in themselves correct. Tax proceedings must stand by the record; and a failure to make the proper record may be as fatal as a failure to take the proceeding of which the record should have been made.
>
> "If, however, the defect in a record is obviously clerical and nothing more; that is to say, if the record on its face sufficiently shows that the proper steps have in fact been taken, but there is some error on the part of the recording officer in putting the evidence upon the record in precise conformity to the law; some omission of a word or the accidental employment of one word for another, or any similar error which cannot mislead—the mistake may be overlooked, and the court, when the record becomes the subject of judicial investigation, may by intendment supply what is omitted, and correct what is erroneous, and then sustain the record as though the proper corrections had been made by the recording officer himself."

After all, however, the important point is, that the claims having been returned *en bloc*, there was only one tract to be described; therefore the correct enumeration of practically all of the 65 claims comprising the group settles the question of identity beyond question. If any one could possibly suffer by the discrepancies complained of it would be the State—if the appellee could possibly be affected at all thereby it would be advantageously.

Opinion of Supreme Court of Arizona in this case (Trans., p. 272, fol. 591):

> "Returning its property *en masse* was a voluntary reliquishment of the known right of separate assessment. The taxpayer should not now be heard to complain" (citing cases), "nor does the fact that the list returned was not verified by the oath of the superintendent of the mining company lessen its effect as such waiver. It is, nevertheless, a voluntary statement by the appellee of the manner in which its property might be properly assessed."

II.

Proof of a raise in the valuation of eight claims out of a group of sixty-five assessed en bloc was in legal effect proof of a raise in the valuation of the whole tract, and such proof did not constitute a variance from the allegation of the complaint that the whole tract, or all the claims, had been raised.

We think it plain that the court erred in holding (Trans., p. 277, fol. 601) that proof of a raise upon eight claims constituted no proof of a raise upon the 65 (of which the eight were part) alleged in the complaint to have been raised. To so hold, the court must have ignored what it had already held, that the whole 65 were returned as one tract. This being true, how could value be added to eight or any number of the component parts of the tract without adding to the value of the whole? And if we are to accept appellee's position, these raises could have had no other possible effect, as it contended vigorously that, as these eight claims had not been separately assessed originally, no separate raise could be made, as there was no original valuation of any specific claim to be added to. If this position is right, it follows that the raises must be treated as having been made to the whole. In fact, the Supreme Court of Arizona says, in its opinion (Trans., p. 274, fol. 595):

"It might be argued successfully that had the Board of Supervisors raised the assessment upon the group, such a raise might have been valid."

We think at this point an excerpt from our motion for rehearing is peculiarly appropriate:

"The error of the court in this respect we think is due to its failure to effectuate the obvious intention of the board, which was to assess this whole property in an amount appropriate to its actual value, whether it be regarded as a raise of eight claims only or as a raise of the whole group. Such being the intention of the Board, and inasmuch as the law favors the payment of just and equitable taxes, it naturally follows that if ineffectual as a raise on particular claims, the assessment operated as a raise upon the whole group, and the same became impressed, *eo instante*, with the obligation to pay the tax.

"Having determined that the company had, by its return, voluntarily relinquished its right of separate assessment, the court should also have found as a necessary sequence thereto, that the company had thereby relinquished its right to claim the privilege of paying the tax upon any portion less than the whole, and of discharging the lien upon that portion without paying upon the remainder. As the taxpayer has relinquished of his own accord his privilege of separate assessment, he has as a matter of course relinquished also the right of paying upon any part less than the whole, for the exercise of that right depends upon the manner in which the original assessment has been made; otherwise, it would be futile to say that the original assessment *en solido* was valid, when by claiming his right of segregaton he could later avoid the payment of any taxes, on the ground that he had been deprived of that right. To allow this, would be to permit him to take advantage of his own wrong.

"It follows then that it was not the raising of the valuation of certain particular mines which deprived him of his right of segregation, but it was due to the voluntary act of the taxpayer in returning his property *en masse*. It follows, also, that the legality of

the raise cannot thereafter be questioned on that particular ground.

"While the decision of the court compels us to take different ground respecting the effect of the raise than we have heretofore held, we are convinced by the court's reasoning that the Board could not lawfully segregate these eight claims from the mass and raise the valuation of them separately, there having been no separate assessment. But we most respectfully differ essentially from the conclusion of the court that this action was void. If it be true that there could be no segregation, either for the purpose of permitting the payment of taxes upon a particular tract less than the whole, then it follows that a raise of any part of the original group is in effect a raise of the whole. For it must be apparent that the value of the whole tract is equal to the value of all its parts, so that when the value of part was raised, the amount so added merely increased the aggregate value of the whole tract.

"The court concedes that the Board had the right to raise the value of the whole tract. If the acts of the Board have this effect, then the raise is valid and the court should give it effect. The taxpayer is not injured by the irregularity. Its position is precisely the same as though the Board had expressly added to the value of the whole tract. It would have to pay exactly the same amount of taxes in either case to discharge the tax lien, and payment under the present status of the record will free its property just as effectually as though it had paid the same sum under a raise of the whole tract.

"The court will bear in mind that there is no testimony in the record that the raised valuation exceeded the cash valuation of the whole tract, and even the evidence that was admitted on the question of valuation was flagrantly inadmissible, for the reasons stated in our reply brief.

"This effectually disposes of the theory of the court that 'there are in effect two assessments for the same year against each of the eight claims raised; one, an assessment commingled with that of sixty-four other claims *en bloc;* the other separate and distinct.' There was but one assessment of the whole tract, and

in legal effect one raise of the whole tract. This also harmonizes the action of the Board with the original return made by the taxpayer, and disposes of the theory of this court that the Board 'disregarded the original classification.' If the Board could not raise segregated portions of the whole, then of course it did not. If the act of the Board operated to raise the value of the whole, then it is the duty of this court to give such acts effect, especially as such course leaves the taxpayer in the same situation as though the raise had in terms been applied to the whole tract.

"This situation also harmonizes the variances between the complaint and the assessment rolls, etc., and renders the differences immaterial. For if the several mines listed are to be treated as one tract for the purpose of assessment, as they must be under the holding of this court, then if there be sufficient description to identify the tract, there is complete harmony between all the lists. It of course will not and cannot be suggested that there is any doubt raised by the variances as to the identity of the tract. Indeed, the description of the property as a tract is ample under paragraph 2652, Revised Statutes 1887, subdivision six, which reads in part as follows:

" 'And the description of real estate shall be sufficient if the same can be readily identified thereby.' "

"If the taxpayer pays on the claims described in the complaint, he pays on so many of them as are also named in its return and upon the assessment rolls and thereby discharges the lien on all. If claims are mentioned in the complaint which are not named in the list returned or the assessment rolls, the taxpayer is not hurt, as he only pays the taxes upon the claims actually owned and returned. No additional tax is imposed by reason of the claims erroneously added in the complaint, and in any event the taxpayer is fully protected as to all the claims in the tract when he satisfies the judgment, as the judgment must be against the whole tract. In case the taxpayer suffers a sale under execution, it is not injured because some claims belonging to and returned by it are omitted from the sale, neither is it injured if some of the

claims not returned by it are not included in the sale, as it loses nothing and the purchaser takes nothing thereby. But viewed in any light, the complaint correctly describes enough claims to identify the tract, and that is sufficient, especially in view of the numerous admissions in the record by appellee that the tract described in the complaint is one with the tract returned and assessed.

"This brings us to a consideration—now hardly necessary—of the holding of the court set forth on page 12 of the opinion:

" 'By the action of which complaint is made here' " (the raise upon the eight claims), " 'the Board deprived the appellee of this right' " (the right to pay on any one of parcels separately assessed, discharging the lien thereon, without paying on the remainder). " 'Upon the raise being made, it had the legal right to determine upon which, if any, of the claims so raised it would pay. If it determined to pay upon none, it was, nevertheless, obliged to pay a portion of the tax thereon if it exercised its right to pay upon the 57 claims remaining, for the tax collector, under par. 2676, *supra* (re-enacted par. 3900, R. S., 1901), could not receive the tax upon less than the entire 65 claims, that being the least subdivision appearing upon the assessment roll. If it determined to pay upon one or more of the eight so raised and abandon the remainder, it would have to pay the tax upon the raise, together with the tax upon the entire sixty-five claims as originally assessed.' "

"The 'tax upon the entire sixty-five claims as originally assessed,' valued at $3,180 in the aggregate, amounts to $101.70, or an average of $1.56 per claim. Under the first proposition stated by the court it would lose eight times $1.56, or $12.48. In the latter case it might lose either $1.56 or $10.92, dependent upon how many of the eight claims might be abandoned."

"(We doubt whether the payment of any of these sums—as taxes—would be a great hardship to the appellee; the ordinary taxpayer would be quite willing that the court should disregard both propositions on the ground of *de minimis*.)

"Finally, if the raise made by the Board is treated

by the court—as rightly it ought to be—as a raise upon the whole group, then the Missouri cases cited by the court on page 15 of its opinion have absolutely no application. If the assessment was on separate parcels, and the parcels were fatally misdescribed so that they could not be identified, the Missouri cases might apply. Here, however, the taxpayer owned a tract comprising 65 claims, which it returned and which were assessed *en masse*. The only question is as to the identity of the tract, and as there is and can be but one, and as admittedly the tract described in the complaint is the same tract returned, there is no variance."

III.

The court erred in holding that payment of the tax upon the valuations fixed in the original assessment would not render harmless the alleged errors and omissions made in transcribing the names of said sixty-five patented mining claims from list to book and from the book to the complaint, for the reason that the payment of said original tax is a binding admission on the part of the company that the original assessment was valid; and for the further reason that the record shows payments in addition to the tax upon the valuation of mining claims as originally fixed, and ignored by the court, to-wit: (1) Under the judgment of the District Court of Cochise County, December 23, 1901, upon the addition of $50,000 to the value of "Hoisting Works and Improvements on 'Silver Spray' mine (Trans., p. 65), amounting at the tax rate of that year—$3.20 per hundred—to $1,600, and a like additional amount under the same judgment upon buildings and other improvements"; making a total additional payment on mining claims of $3,200. (2) Under the attempted compromise of June 7, 1904 (Trans., p. 78), $5,661.44, which sum, under the terms of said compromise pursuant to appellee's own proposition, was to be applied solely to the tax on mining claims, and, to use the language employed by appellee in proposing said com-

promise, "which said sum, together with the sum already paid by said company into the treasury of said county *at the valuation of five dollars per acre returned by said company upon 65 patented mines, containing 636 acres, in the year 1901, makes the actual basis of valuation per acre of said patented mines in this compromise thirty-seven dollars and fifty cents.*"

We plead that the sum of $14,133.12 was paid as a partial payment, but we positively do not plead it as a *partial payment of the tax arising upon the original assessment* as laid by appellee and the assessor. On the contrary, we distinctly plead it *as a part payment of the sum of $122,657.09*, being the amount of tax due on September 9, 1901 (after equalization), the date of the payment (Trans., p. 6, fol. 12). No matter how it was paid, received, or receipted for, the fact remains that said sum was the *precise amount of tax arising upon the original assessment* and is expressly pleaded by appellee as full payment (Trans., p. 28, fol. 61). In the latter citation appellee says that "it tendered to the treasurer and tax collector * * * the full sum of $14,133.12, being the taxes due by plaintiff (appellee) upon *its property aforesaid* (the italics are ours), for the year 1901, * * * but that said tax collector refused to accept the same." And on page 28, fol. 61: "That thereafter, at the December, A. D. 1901, term of said court, at the trial of said action, the payment of said sum was tendered by said Copper Queen Consolidated Mining Company * * * for said amount of taxes to said tax collector, and said sum was received and accepted by him for said amount of taxes."

We admit that the tax collector could not accept $14,000 as full payment of $122,000, but this has nothing to do with the fact that the sum of $14,133.12 was the exact amount of the original tax, and that it was voluntarily paid by the appellee.

We contend that the payment of this money, together with other acts of the appellee, fraught with similar consequences,

estops appellee from saying that the assessment was not valid or that the description of its property was defective.

Moreover, the record shows that in December, 1901, it paid the further sum of $9,589.27 on these taxes (Trans., p. 29), and that another payment was made on June 7, 1904, pursuant to an attempted compromise (Trans., p. 29). Is it possible that appellee paid in these various sums without knowing whether it was paying the tax on its own property or that of some one else? In its own suit, which it refers to in its answer (par. XIX, Trans., p. 28, fol. 61 *et seq.*), it describes the property almost literally as we describe it (Trans., p. 53, fol. 117).

IV.

Question of overvaluation cannot be inquired into in this proceeding.

First. Because no appeal was taken by the defendant as provided by paragraph 3875, Revised Statutes of Arizona, 1901.

In paragraphs XX and XXI of its answer appellee attempts to plead that its property was overvalued. It is expressly precluded from doing this by statute. Par. 3875, R. S. 1901, points out the only manner in which alleged overvaluation by a county board of equalization can be corrected, and that is by appeal to the district court, as a condition precedent to which appeal the full amount of the alleged unjust tax must be prepaid. The district court has power to refund should it find any part of the tax to be excessive, or to render judgment for the balance should it find the cash value of the property to be more than that fixed by the board of equalization. This remedy, known as the "Andrews Law", became effective September 1, 1901, although of course it was known of by every lawyer long before that time, so that appellee had until September 20th, at

least twenty days, within which to appeal, if it so desired. Instead of doing this, as the records of this case show, it chose to file a bill in equity (Copper Queen Consolidated Mining Company *vs.* M. D. Scribner, Tax Collector *et al.* No. 787) just one day before the "Andrews Law" went into effect, wherein it sought to restrain the collection of any tax in excess of $14,133.12. Of course, it sought in this adroit proceeding to escape the payment of its taxes in advance and at the same time to get all the benefit of an appeal. This, under a rule too familiar to need mentioning, it cannot do. The "Andrews Act," of course, is intended to and does cover all cases of overvaluation, whether caused by fraud, prejudice, ignorance, mistake, or discrimination. It matters not *how* the overvaluation is reached; the court will only determine whether it has been reached and act accordingly. But, as we have shown, neither fraud nor overvaluation is properly pleaded, so that these charges could not be considered under any view of the case.

Second. Because appellee resorted to equity, but did not pursue its remedy to judgment.

Third. Because of par. 3875 the court has no jurisdiction to consider questions of valuation in this proceeding, for the reason that the court cannot alter or change valuations.

Mead *vs.* Haines, 82 Mich., 264.

Pacific Postal Tel. Co. *vs.* Dalton, 51 Pac., 1073.

Fourth. The court cannot consider charge of overvaluation, for the further reason that the actual value of the property is not pleaded.

Par. 3836, R. S. Arizona, 1901.

Humbird Lumber Co. *vs.* Thompson, 83 Pac., 945.

State *vs.* Saddler, 23 Pac., 799.

A. & P. Ry. Co. *vs.* Yavapai Co., 21 Pac., 768.

Copper Queen Con. Mining Co. *vs.* Scribner, 71 Pac., 946.

Fifth. The allegation of fraud is insufficient, being too general. No valuation is pleaded as basis of alleged fraudulent overvaluation.

Auditor General *vs.* Stiles, 83 Mich., 463.
Hamilton *vs.* Rosenblat, 8 Misc. App., 237.
Black on Tax Titles, 175, 216 and 219.
Maish *vs.* Arizona, 164 U. S., 611.
State *vs.* Saddler, *supra.*

Fraudulent overvaluation cannot be pleaded or shown when statutory remedy for correction of overvaluation existed and was not availed of and no excuse shown.

Black on Tax Titles, 219, and cases cited under note 24.

Excessive valuation cannot be attacked collaterally in an action to recover taxes.

Austin *vs.* Westchester Tel. Co., 28 N. Y. Supp., 77.

Relief from illegal tax must be sought in the statutory manner.

Rickets *vs.* Crewdson, 79 Pac., 1042.

Par. 3872 of the Revised Statutes of Arizona, 1901, provides as follows:

> "The decision of the board as to whether the assessed value of any property shall be increased, and, if so, to what amount, shall be final, *and shall not thereafter be questioned in any proceeding involving the amount of the taxes legally and equitably due thereon, unless an appeal is taken as hereinafter provided.*"

Lastly, appellee here does not deny the ownership of the property assessed to it, or any part of it. It does not deny that the description it furnished was good enough when it turned it in under oath. It was good enough for it when it

paid the taxes thereon, *based on its own valuation*, in 1901 (Trans., p. 193). It was good enough when it adopted it *verbatim* in its injunction suit, the amended bill in which appellee introduced in evidence in the trial court (Trans., p. 53). It was good enough for it when it paid the additional tax based thereon, as decreed by Judge Davis in the injunction suit (Trans., p. 65). It was good enough for it when it made its "compromise" with the Supervisors of Cochise County, wherein it sought to evade the tax herein sued for upon payment of $5,661.44 (Trans., p. 79), which said compromise it attempted to plead, description and all, by way of abatement to this action, though the compromise was declared void (Territory *vs.* Gaines, 93 Pac., 281). The same kind of a list was good enough for it prior to 1901 (Trans., p. 187). It has been good enough for appellee all these years and throughout all its devious attempts to effect a settlement on the basis of its own home-made valuations. It ought to be good now. And, according to the overwhelming weight of authority, it is.

Respectfully submitted,

ELIAS S. CLARK,
WILLIAM G. GILMORE,
GEORGE P. BULLARD, *Attorney General of Arizona,*
Attorneys for Appellant.

WILLIAM C. PRENTISS,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

Clerk Supreme Court, U. S.
FILED
FEB 26 1914
JAMES D. MAHER
CLERK

THE TERRITORY OF ARIZONA, at the relation and to the use of J. N. Gaines, as Tax Collector in and for the County of Cochise, in the Territory of Arizona,

Appellant,

vs.

COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation,

Appellee.

No. 89.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

STATEMENT AND BRIEF OF APPELLEE.

E. E. ELLINWOOD,
FREDERICK N. JUDSON,
JOHN F. GREEN,
Attorneys for Appellee.

St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell, Main 1819.

INDEX.

	Page.
Statement.	1
The issues made by the pleadings	2
The complaint.	2
The answer	3
Discrimination pleaded by defendant	3
The facts found by the Supreme Court of Arizona.	8
The assessment roll of Cochise County for the year 1901.	10
The duplicate assessment roll of Cochise County for the year 1901	14
The Back Tax book of Cochise County for the year 1901.	16
Opinion of the District Judge	19
Opinion of the Supreme Court of Arizona	25

Points and Authorities.

I. The "manifest error" rule in Territorial appeals.	37
II. Intentional and arbitrary discrimination proved.	37
III. Discrimination properly pleaded	38
IV. The decision sound upon principle and authority.	38
The statute so construed in Missouri	38
V. Absence of specific description not cured by estoppel.	40
VI. Nor by payments in prior litigation and attempted compromise.	41
VII. No merit in assignments of error	42

Argument.

I. The manifest error rule as to construction of Territorial statutes..... 43
II. Intentional and arbitrary discrimination 46
Judge Doan on issue of discrimination.. 46
Arbitrary discrimination proved by findings of Supreme Court..... 47
The dilemma in tax discrimination cases 49
The rule in Raymond v. Traction Co., 207 U. S. 20..... 50
The assessment proved to be in excess of cash valuation..... 52
The Fourteenth Amendment and taxation discrimination..... 54
The Organic Law of the Territory..... 55
III. Discrimination properly pleaded..... 57
No appeal from Board of Equalization to District Court for discrimination.... 58
IV. The construction of the statute by Arizona Court unassailable..... 61
The construction in Missouri of same statute..... 61
The assessment invalid for lack of specific description..... 66
The Arizona decisions and statutes..... 70
The raise by Board of Equalization invalid..... 74
The rule universal as to the necessity of specific description for tax lien..... 77
V. No estoppel against appellee to cure lack of specific description..... 84
The rule established in Missouri..... 84

Necessity of specific description not waived by return of taxpayer..... 88
VI. The defects not validated by compromise payments. 90
Or payments required under rules of equity procedure. 92
VII. No merit in assignments of error..... 94
Shown by the shifting positions of appellant. 95

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

THE TERRITORY OF ARIZONA, at the relation and to the use of J. N. Gaines, as Tax Collector in and for the County of Cochise, in the Territory of Arizona,

Appellant,

vs.

COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation,

Appellee.

No. 89.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

STATEMENT AND BRIEF OF APPELLEE.

STATEMENT.

This is an appeal from the Supreme Court of the Territory, now State, of Arizona. The action was a special statutory proceeding for the enforcement of the lien of the State for the payment of certain taxes in the year 1901 against certain patented mining claims in the County of Cochise amounting to $120,039.35, being a tax upon the increased valuations of the mining claims of appellee claimed to have been made by the

Board of Supervisors of Cochise County. The action was the statutory proceeding for the enforcement of the tax lien upon specific property. Judgment was entered for the defendant by the trial court (see Opinion, Printed Record, p. 35). Appeal being made by the complainant to the Supreme Court of Arizona the judgment was affirmed (see Opinion, Printed Record, p. 268). Appeal having been taken by the complainant from this judgment of the Supreme Court of Arizona (then a territory) to this court, the Supreme Court of Arizona, under the provision of the statute of the United States (18 Stat. L. 27) regulating the appellate jurisdiction of this court over the judgments of territorial courts, and also under the provision of the Organic Act of the Territory, Sec. 36, made for this appeal its statement of facts (Printed Record, p. 287).

THE ISSUES MADE BY THE PLEADINGS.

The complaint (Printed Record, pp. 1 to 10) set out the original assessment, the sixty-five patented mining claims, consisting of 636 acres, being assessed in bulk as 636 acres at $5.00 per acre, making $3,180.00, and also certain personal property which is not in controversy in this action, and increase of said assessment of the mining claims by the Board of Supervisors of Cochise County, so that the assessment of the mining claims, after the increase, amounted to $3,260,000.00. The complaint alleged that there was a balance due with interest amounting to $120,039.39 on June 8, 1904, and prayed for judgment for said amount with interest at the rate of 10 per cent from that date and 4 per cent additional for the fees of the tax collector and 25 per cent upon the aggregate amount found due for attorney's fees, and that the judgment be a first and paramount lien upon the lots, tracts and parcels of land, that is, the said mining claims.

THE ANSWER.

The defendant, while specially and generally demurring to the sufficiency of the complaint as allowed under the Arizona practice, filed its answer (Printed Record, pp. 24 to 35), wherein it denied the validity of the assessment and the alleged increase, and set up a compromise and satisfaction of the tax claim in 1904 whereby the county was paid the sum of $5,666.44 in full settlement of the alleged claim. The contention of the defendant as denying the validity of the assessment and the alleged increase, was sustained both by the trial court and the Supreme Court, as will be hereafter seen, so that it became unnecessary for either court to consider the further defense in paragraphs 20 and 21 of the answer (Record, pp. 31 to 33), setting up that the action of the Board of Equalization was not only violative of the organic law of the Territory, but also violative of the Fourteenth Amendment of the Constitution of the United States denying to the defendant the equal protection of the laws.

As the facts on which this unlawful discrimination was based, were specifically found by the Supreme Court in its finding of facts, we herewith set out these averments of the answer:

Discrimination Pleaded by Defendant.

"And further answering the said complaint of the plaintiff by way of answer, the defendant alleges:

"That the defendant is a corporation under the laws of the State of New York and engaged in the mining business in the Territory of Arizona, and is protected by Section 15 of the Organic Act of the Territory of Arizona against discriminating and unequal taxation, in that it is provided by

said section that the land or other property of non-residents shall not be taxed higher than the land or other property of residents. And defendant says that this equality of taxation required by the organic law of the Territory requires equality in valuation as well as in the rate of taxation.

"Defendant says that the action of the Board of Equalization of Cochise County, Arizona, set forth in the complaint in what is termed the increase of assessment of the Silver Spray Mine, the Holbrook Mine, the Copper Queen Mine, the Copper Jack Mine, the Baxter Mine, the Atlanta Mine, the Dividend Mine and the Rucker Mine, and on the improvements thereon on said respective mines, was not only void in law, as an assessment of said several properties, for the reason that there was no valid assessment upon any one of said separate properties to which the said several increases could lawfully attach, but that said attempted increases were wholly without warrant of law and were fraudulent in law in this, that the same were made knowingly and willfully in violation of the uniform system of valuation of that class of property theretofore adopted and continually enforced by the Board of Equalization in the assessment of properties of that class in said county and of the assessment of said properties of that class in other counties.

"The several properties referred to by said names were patented mining claims, and in view of the recognized uncertainty of determining the cash value of such properties, growing out of the uncertainty and speculative character of the mining business, the custom had been established in this and other counties of the Territory, to fix the cash value of such mining claims at the uniform rate of five dollars per acre; and this custom of assessment was not occasional but habitual, and had been acquiesced in and enforced by the assess-

ing officers and by the Board of Equalization and also acquiesced in by the mine owners of the Territory. The assessment roll of Cochise County, Arizona, included, for the year 1901, several hundred mining claims assessed upon this basis, and this was the uniform rule adopted throughout the Territory, and had been for many years in the assessment of this class of property.

"The Board of Equalization of this county made no investigation whatever to determine the value of said mining claims, nor did it hear any evidence thereon. Defendant says that the action of the board in this matter was for the purpose of placing an unfair and undue burden upon the defendant, discriminating against this defendant, so that this defendant will be compelled to pay more than its share of its just taxes for the year 1901, and so that the property of the defendant should be taxed higher than the property of others, including residents of the Territory. Defendant says that this inequality in valuation thus attempted by the Board of Equalization of Cochise County was intentional, and made with the purpose of and with the necessary effect of placing upon this defendant an unequal burden of taxation compared with residents of the Territory, and with other owners of the same class of property.

"Defendant says that, as it has paid its full share of taxation upon the said valuation of its property, made in accordance with the valuation of other properties of the same class in the Territory, and that the amount sued for in this petition is based upon said illegal attempt to place upon this defendant an unequal burden of taxation.

"Defendant says that the action of the said Board of Equalization was not only violative of the organic law of the territory, but also violative of the Fourteenth Amendment of the Constitution

of the United States, in denying to this defendant the equal protection of the laws.

XXI.

"And further answering the said complaint of the plaintiff by way of answer, the defendant alleges that the defendant is a corporation under the laws of New York and engaged in the mining business in the Territory of Arizona, and is protected by Section 15 of the Organic Act of the Territory against discriminating and unequal taxation, in that it is provided by said section that the land or other property of non-residents shall not be taxed higher than the land or other property of residents. Defendant says that this equality of taxation required by the organic law of the Territory requires equality in valuation as well as in the rate of taxation.

"Defendant says that the action of the Board of Equalization of Cochise County, Arizona, set forth in the complaint in what is termed the increase of assessment of the Silver Spray Mine, the Hollbrook Mine, the Copper Queen Mine, the Copper Jack Mine, the Baxter Mine, the Atlanta Mine, the Dividend Mine and the Rucker Mine, and on the improvements thereon on said respective mines, was not only void in law, as an assessment of said several properties, for the reason that there was no valid assessment upon any one of said separate properties to which the said several increases could lawfully attach, but that said attempted increases were wholly without warrant of law and were fraudulent in law in this, that the same were made knowingly and willfully in violation of the uniform system of valuation of that class of property theretofore adopted and continually enforced by the Board of Equalization in the assessment of properties of that class in said

county and of the assessment of said properties of that class in other counties.

"The several properties referred to by said names were patented mining claims, and in view of the recognized uncertainty of determining the cash values of such properties, growing out of the uncertainty and speculative character of the mining business, the custom had been established in this and other counties of the Territory, to fix the cash value of such mining claims at the uniform rate of five dollars per acre; that this system of assessment was not occasional, but habitual, and had been acquiesced in and enforced by the assessing officers and by the Board of Equalization and also acquiesced in by the mine owners of the Territory. The assessment roll of Cochise County, Arizona, for the year 1901, included several hundred mining claims assessed upon this basis, and this was the uniform rule adopted throughout the territory, and had been for many years in the assessment of this class of property. The Board of Equalization of this county made no investigation whatever to determine the value of said mining claims, nor did it hear any evidence thereon. Defendant says that the action of the board in this matter was for the purpose of placing an unfair and undue burden upon this defendant, discriminating against this defendant, so that this defendant will be compelled to pay more than its share of its just taxes for the year 1901, and so that the properties of the defendant should be taxed higher than the property of others, including residents of the Territory. Defendant says that this inequality in valuation thus attempted by the Board of Equalization of Cochise County was intentional and made with the purpose of and necessary effect of placing upon this defendant an unequal burden of taxation as compared with residents of the Territory, and

with other owners of the same class of property.

"Defendant says that not only was this attempted increase unlawful and fraudulent, in that it was made for the purpose of discriminating against the defendant, and of making it bear unequal burdens of taxation as compared with residents of the territory and owners of the same class of property, but that it was also illegal and void, in that the valuation thus placed was in excess of the then cash value of said properties, according to the standard fixed by the laws of Arizona, and was an excessive and over valuation of said properties.

"Defendant says that it has paid its full share of taxation upon the said valuation of its property made in accordance with the valuation of other property of the same class in the territory, and that the amount sued for in this petition is based upon said illegal attempt to impose upon this defendant an unequal burden of taxation.

"Defendant says that the action of the said Board of Equalization was not only violative of the organic law of this territory, but was also violative of the Fourteenth Amendment to the Constitution of the United States, in denying to this defendant the equal protection of the law.

"Wherefore, having fully answered, the defendant prays that it may go hence without day, and for costs."

The Facts in the Cause as Found by the Supreme Court of Arizona in Its Special Finding of Facts for This Appeal.

As the statement of appellant as to the facts disclosed by the record is in our opinion defective and misleading we adopt as our statement the statement

of facts made by the Supreme Court of Arizona, which is as follows: **(Bold-face type is ours.)**

An appeal herein to the Supreme Court of the United States having been allowed on the 22nd day of March, 1911, the Supreme Court of Arizona makes and orders filed this, its statement of facts in the nature of a special verdict on such appeal.

This is a special statutory proceeding brought under Act No. 92 of the Laws of 1903 of the Territory of Arizona, which was adopted from the statute of the State of Missouri to enforce the lien for territorial and county taxes for the year 1901 on the property described in the complaint, said taxes amounting with interest and costs to the sum of $120,039.35 on the 8th day of June, 1904, together with interest thereon since that date, at the rate of 10 per cent per annum, and the further sum of 4 per cent of the amount found due as the tax collector's fee and the further sum of 25 per cent of the amount found due as the tax attorney's fee. The case was tried in the lower court without a jury.

Judgment was entered in favor of the defendant, appellee, to the effect that the plaintiff, appellant, take nothing by its action; from which judgment the appellant appealed to this court. This court, on appeal, affirmed the judgment of the lower court. The facts as found by the Court are as follows:

The appellee, the Copper Queen Consolidated Mining Company, is a corporation doing business and owning real and personal property in Cochise County, Arizona. During the time provided by law for the assessment of property for territorial and county purposes, in the year 1901, it listed and returned to the Assessor of Cochise County for assessment certain patented min-

ing claims belonging to it, being sixty-five in number and listed as follows: Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave (Dividend-Wedge-Ellie-Coon), East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Holbrook, Howell, Harrison, Iron Monster, Little New York, Little Joker, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sunrise, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail, Deer, Bisbee, Bell Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars & Stripes, South View, Tack, Union and Virginia.

The tax list so returned appeared upon its face to be verified by the oath of the superintendent of the mining company, **but, in fact, was not so verified.** Said list, as returned, included among other property the aforesaid sixty-five patented mining claims as one tract, which tract was stated therein to comprise 636 acres and was valued at $3,180.00, and the improvements thereon valued at $55,431.76. Other real and personal property was returned in said list, and all said property, including said patented mines, was listed at a total valuation of $368,139.76. **A portion of the patented claims included in said list are not contiguous to any of the others.**

The assessment as entered and shown upon the original assessment roll is as follows:

CHART

TOO

LARGE

FOR

FILMING

At a meeting of the County Board of Supervisors sitting as the Board of Equalization for Cochise County, held on July 17th, 1901, the said Board of Equalization raised the assessment upon eight of the group of sixty-five claims originally assessed *en masse*, in amounts varying from $50,000.00 to $1,000,000.00 each. The action of the Board of Equalization in making this raise is disclosed by the minutes following:

> "In the matter of the equalization of the assessment of the properties belonging to the Copper Queen Consolidated Mining Company:
>
> "This matter coming on this day regularly to be heard before the Board of Equalization pursuant to a notice heretofore served upon said company in writing, and which notice appears in the minutes of said board, and in which said notice it was proposed to change and correct the valuation of said company's property as the same appears upon said assessment roll, by adding thereto the sum of $3,464,895.00; for the reason that the sum fixed in said assessment roll appears to be too small; and this being the day and hour fixed in said notice for the hearing, and pursuant to a notice so given Walter Douglas, Superintendent and Agent of said company, appeared before the board in behalf of said company and made statements regarding said valuations, and his arguments in reference thereto, and the board being now fully advised in the premises, finds it necessary to add to the assessed valuation of the property of said company on the assessment roll as follows, to-wit:

Silver Spray Mine	$1,000,000.00
Hoisting Works and improvements on said mine	50,000.00
Holbrook Mine	1,000,000.00
Hoist and improvements thereon	10,000.00
Copper Queen Mine	50,000.00
Copper Jack Mine	50,000.00
On buildings and other improvements	50,000.00
On Baxter Mine	250,000.00
On Atlanta Mine	250,000.00
On Dividend Mine	350,000.00
On Rucker Mine	200,000.00
Stock of Mdse. in C. Q. store and warehouses	203,520.00
Surveying instruments	375.00
Assaying outfit	600.00
Horses	400.00
Or a total valuation of	$3,464,895.00"

Thereafter the rate of taxation for county and territorial purposes was fixed and levied upon all the taxable property in Cochise County at $3.20 per $100.00 of valuation.

The tax so assessed upon the property of the appellee as raised, amounted to the sum of $122,657.09. Whereupon, the appellee filed an injunction suit in the District Court of Cochise County, prior to September, 1901, to enjoin the collection of the tax, upon the ground that the said increase therein had been fraudulently made, and that it was an over valuation of its property. It tendered, in said suit, the full sum of $14,133.12, being the amount of the tax upon all of its property, real and personal, as assessed for said year, prior to the said increase thereof by the Board of

Equalization. The District Court granted an injunction against the collection of that portion of the tax in controversy here upon condition of the payment of the sum of $14,133.12 into court, and also on condition of appellee's paying the further sum of $9,589.20, which it subsequently paid, which last sum was the amount of the tax upon the increase made by the Board of Equalization in the value of certain personal property, which increase in the value of personal property the District Court found to be valid. The District Court, in said suit, found, as one of its findings of fact, that the increase by the Board of Equalization in the value of the mining claims was not based upon any information or evidence had or obtained by them, but was made arbitrarily and capriciously and for the purpose of imposing upon the plaintiff an unjust share of the burden of taxation. The sum of $14,133.12 so paid by the plaintiff to the county for the tax levied upon the original assessment, which the appellee had tendered, was accepted by the County Treasurer and *ex officio* tax collector, "on account of any moneys which might ultimately be determined as due from said company for its tax for said year". An appeal was taken by Cochise County from this decree of the District Court. The Supreme Court of the Territory on said appeal reversed the decree of the District Court, and remanded the case for new trial (8 Ariz. 221). Subsequently to the rendition of this decision by the Supreme Court of Arizona an effort was made to compromise the claim of the county, and an agreement of compromise was entered into, under authority of a resolution of the Board of Supervisors adopted July 7, 1904, whereby the Copper Queen Company agreed to pay, and did in fact pay, the further sum of $5,661.44

in full settlement of all taxes for the year 1901. Thereupon the injunction suit was dismissed by the appellee. This sum of $5,661.44, so paid to the county under said compromise agreement, has been ever since retained by the county. Subsequently a proceeding in *mandamus* was instituted against the tax collector of Cochise County to compel him to commence suit against the Copper Queen Company for the collection of the balance of the tax for the year 1901, upon the ground that the compromise so made was unauthorized and void. The Supreme Court of Arizona held, in the *mandamus* suit, that the Board of Supervisors had no authority to compromise said tax, and granted a writ of *mandamus*. This present suit for the collection of the tax and enforcement of the penalties provided by statute was instituted pursuant to the said order in the *mandamus* case.

The testimony at the trial of this case was undisputed that the raise made by the County Board of Equalization in the assessment of said eight patented mining claims was **not based upon any evidence as to the value of the claims so raised and that it was in fact arbitrary. It was also established by the uncontradicted evidence** that certain of the patented mining claims which were thus raised in value by the Board of Equalization were **assessed far in excess of their full cash value.** It was shown that the duplicate assessment roll was made out by the assessor in the following form:

CHART

TOO

LARGE

FOR

FILMING

The tax being then unpaid, at the close of business, on the third Monday of December, 1901, the tax collector turned in the delinquent list, which was certified to the Board as being a true list of all persons and property owing taxes for that year that had not been paid, and the amount thereof. On this list appears the property of the defendant company as sixty-five patented mines, containing 636 acres, valued *en masse* at $3,180.00 for the real estate and $55,431.00 for the improvements thereon; and also an additional list or statement which shows the several amounts in which the valuations of eight of said mining claims were increased by the Board of Equalization, giving the amounts of the increase, but **not giving either the original valuations of the said eight mines or the total valuation of them or any of them as increased.**

The said delinquent list was made out in the following form:

(See same attached hereto, opposite this page.)

Under the law of 1903 the property thus delinquent was carried into the back tax books of that year; and it is for the foreclosure of the Territory's lien for taxes on the different pieces of real estate thus appearing in the back tax book that this suit is brought. The back tax book, put in evidence, showed the property of the defendant company, the total valuation of $3,833,-034.76; the total taxes, $122,657.09; the amount paid on account, $23,265.76; balance due, $99,391.33; and in enumerating the several tracts and parcels of land thus remaining unredeemed, it gives sixty-five mining claims, containing 636 acres; valued *en masse* at $3,180.00, improvements thereon $55,431.00, and mentions by name sixty-four claims. It gives the same number of acres for the list named therein as is given in all the other lists, and also contains all the other valuations for real estate and improvements. It gives the list of the increased valuations of the several mining claims and improvements which were increased by the board, but **gives no total valuation of said separate pieces of property, after the addition of such increase.** This list was entered in the back tax book in the following form:

CHART

TOO

LARGE

FOR

FILMING

The list of mining claims set forth in paragraph IV of the complaint is as follows:

Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend Wedge, Ellie Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Holbrook, Howell, Harrison, Iron Monster, Little New York, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Belle, Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Culprit, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia.

Said mining claims consisting of 636 acres assessed at $3,180.00.

The complaint differs from the list shown in the assessment roll in this: It names the "Dividend Wedge," the "Howell", the "Belle" and the "Isle", which are omitted from the assessment roll; it omits the "Dividend", the "Wedge", the "Powell", the "Little Joker", the "Sunrise" and the "Belle Isle", all of which are included in the assessment roll; it names only sixty-five claims, whereas, the assessment roll names sixty-seven.

The complaint differs from the list shown in the duplicate assessment roll in this: It names the "Howell", the "Dividend Wedge", the "Belle" and the "Isle", all of which are omitted from the duplicate assessment roll; it omits the "Powell", the "Divi-

dend", the "Wedge" and the "Belle Isle", all of which are included in the duplicate assessment roll.

Again the complaint differs from the list contained in the delinquent roll in this: It names the "Dividend Wedge", the "Howell" and the "Silver Bear", all of which are omitted from the delinquent roll, and it omits the "Dividend", the "Wedge" and the "Powell", all of which are included in the delinquent roll. The complaint differs from the list in the back tax book in this: It names the "Dividend Wedge", the "Howell", the "Silver Bear", the "Belle" and the "Isle", all of which are omitted from the back tax book, and it omits the "Dividend", the "Wedge" and the "Powell", and the "Belle Isle", all of which are included in the back tax book.

Neither the complaint in this case nor the assessment roll, nor the delinquent tax list discloses what the total assessed valuation of any individual piece of real estate amounted to or what was the amount of taxes due on any of these separate mining claims or pieces of real **estate.**

It was shown by the testimony of the Assessor that there were some 280 patented mining claims in Cochise County at the time this assessment in 1901 was made, and that they were and had been assessed at **a uniform rate of $5.00 per acre as a rule.**

This findings of facts in the nature of a special verdict is made and rendered by the Supreme Court of Arizona this 20th day of May, 1911.

EDWARD KENT,
Chief Justice of the Supreme Court of Arizona.

OPINION OF THE DISTRICT JUDGE.

Judge Doan, of the District or trial Court, in deciding the cause for defendant, after stating the facts as found by the Supreme Court in the foregoing statement of facts, proceeded:

> "Under the law of 1903 the pieces of property thus delinquent that have been forfeited for the non-payment of the taxes, were carried into the back tax book, and it is for the foreclosure of the government's lien for taxes on the different parcels of real estate thus appearing in the back tax book that this suit is brought.
>
> "We may not in this case render a judgment against the defendant for the amount of the unpaid taxes found due. This is not a personal action, but an action *in rem*. While nominally brought against the defendant, it is really an action against the several pieces of real property for the amount of taxes upon the said several pieces of real property due and unpaid, with penalties and costs. This distinction must be borne in mind in determining the two questions that were presented in this case. First, whether there was a valid assessment originally, and, second, whether the raises in the valuation made by the Board of Equalization were valid, or were in any instance invalid by reason of having been made arbitrarily, and not upon knowledge of the values or upon evidence relative thereto given before the Board.
>
> "In determining the question whether there was sufficient description of the property to constitute a valid assessment we must bear in mind that a description of property sufficient to impose upon the owner an obligation to pay the taxes thereon, or to serve as a basis for a money judg-

ment against the owner as defendant, for which all of his property would be liable under execution, might be insufficient to describe the property with the accuracy necessary to sustain a judgment against the separate tracts of land that constituted such real property for the amount of taxes and penalties due from each separate tract, and therefore to support a decree for the foreclosure on such separate tracts of real property of the lien for taxes in favor of the government on them. The question is not whether the defendant company owes an amount for taxes to the government and should pay it, and it is not whether the assessment sufficiently describes the property to collect a debt from the company because of taxes, but it is whether there is a sufficient description of several tracts of land with their several valuations, and the amount of taxes severally due upon them to enable such taxes to be recovered by a foreclosure of the lien against such tracts of land. Part of the property returned consisted of 65 patented mines, with the aggregate acreage of 636, valued at $3,180 for the real estate, and $55,431 for the inmprovements thereon. The valuation of eight of these mines was increased by the Board of Equalization. There was a definite amount of increase added to them, but no ascertainment of the original valuation of said eight mines, or either of them, and no total valuation after the increase. It is a matter of common knowledge that patented mines are not of uniform value. It is likewise a matter of common knowledge that they are not of uniform area or acreage. It is therefore impossible to ascertain the value placed on any of the 65 mines. If we should depend upon the intrinsic value, we have nothing whatever to enable us to fix a certain valuation, if we attempt to fix their values by adopting an

acreage valuation, we are left in the same situation. The maximum area of a mining claim is 20 acres. The average acreage of the 65 named here would be a fraction less than ten acres, which advises us that the mines vary in size from perhaps twenty acres, the maximum, to a minimum that is not ascertainable. The only definite valuation presented to us is represented by the several amounts in which eight of these mines were raised in valuation by the Board of Equalization. The effect of this raise was to increase the total valuation of the property, and the taxes levied thereon by adding the amount of the raise to the original valuation, and without a definite original valuation we cannot find a definite total. There were three partial payments made by the defendant, aggregating $23,265.76. Part of these payments were intended by the defendant to be applied to the taxes on certain pieces of property, but they were not so received by the plaintiff, but were all received on account, and credited generally to the entire amount of taxes claimed, therefore it is impossible to ascertain the proportion of these payments that was credited to the definite amount of taxes on the raised valuation of these eight mines, without ascertaining how much of the said payments were applied to the taxes on the other different pieces of property, and therefore how much was left to be applied to the taxes upon the raise or increase in valuation of these eight mines, and as that is impossible of calculation, we have no means of ascertaining how much yet remains due and unpaid, of the taxes levied upon these added values, even if we consider them as separate certain valuations.

"It was claimed by the plaintiff that the taxes upon all the property on the original valuation or

levy was paid by the defendant, and the only amount of controversy is the amount of the raise, which the defendant claimed to be invalid. This position is not supported by the record. For this to be true would require that the delinquent list and back tax would contain only the eight mines and the personal property raised.

"The complaint herein alleges: 'Thereupon the tax collector made out a list of all persons and property then owing taxes * * * known as the delinquent list.' 'That, thereafter the clerk of the Board of Supervisors made up in a book called the back tax book a correct list * * * of all tracts of land on which back taxes were then due.' The delinquent list and back tax book, to support the theory of the plaintiff should contain only the eight mines raised, and the unpaid taxes against them for only the amount of the raise, whereas both delinquent list and back tax book contain the entire sixty-five patented mines (except the additions and omissions made by mistakes in transcription) and declare the taxes to be due and unpaid on all, and ask to have the lien foreclosed against all.

"The act provides in section 86 'that if on the first day of January, 1904, any of said lands or town lots contained in said back tax book remain unredeemed, it shall be the duty of the tax collector to proceed to enforce the payment of the taxes charged against said tract or lot by suit in courts of competent jurisdiction in the county where the real estate is situate.' The back tax book as placed in evidence shows the property of the defendant company, the total valuation of $3,833,034; the total taxes, $122,657.09; amount paid on account, $23,265.76; balance due, $99,391.33, and in enumerating the several tracts or parcels of land thus remaining unredeemed, gives

'sixty-five mining claims, containing 636 acres; value of real estate, $3,180; improvements thereon, $55,431,' and named sixty-four claims. This list omits three, the Silver Bear, the Little Joker and Sunrise, that are named in the original tax roll, and omits one, the Silver Bear, that is named in the duplicate roll. It omits five that are named in the complaint in this case, and names four that are not named in the complaint. It gives the same number of acres for the list named therein as is given in all other lists, the same valuation for both real estate and improvements thereon. It gives the list of the increased valuation of the several mining claims and improvements, but gives no total valuation of said pieces of property after the addition of such increase. The back tax book thus presents sixty-four distinct tracts or parcels of land described only by their names as separate patented mines as subject to the lien for the unpaid portion of the taxes assessed against the sixty-five mines that constituted the 636 acres, and the improvements thereon which were returned by the owner and assessed by the assessor. This list of sixty-four presented in the back tax book omits three, to-wit, Little Joker, Sunrise and Silver Bear, that were included in the list given by the defendant to the assessor, and included by the assessor in the assessment roll on which the tax was levied. The taxes, therefore, that were assessed against these three mines and that remain unpaid (after the application of their proportions of the partial payments) are included in the unpaid taxes that stand upon the back tax book as a lien upon the sixty-four mines, therein named, in addition to the unpaid taxes of the said sixty-four mines themselves. There has been no separate valuation given of the said three mines, or either of them, or any statement of the separate amount of taxes due

from them or either of them to enable the Court to deduct such amount from the total amount appearing against the 636 acres as represented by the sixty-four mines named. Nor does it appear what part (if any) of the $55,431 improvements upon the mines constituting the said 636 acres may be upon these three mines, or any of them, so that it is absolutely impossible to make any definite calculation of the amount of overcharge against the remaining sixty-four claims that are named as constituting the entire 636 acres and that stand charged with the entire amount of unpaid taxes that are due, not only upon their separate and respective tracts and the improvements on them, but in addition thereto with the amount that cannot be definitely computed, of the taxes originally assessed against the other three mines named, and the improvements thereon, which remains unpaid after deducting their proportion of the partial payments entered as general credits against the entire tax, and therefore is now due and is included in the aggregate amount charged in the back tax book against these sixty-four mines.

"This renders it impossible to comply with the requirements of Section 88 of the Act under which this action is brought, and which is cited above. As we are unable by any system of computation to determine the amount of taxes due upon any separate tract or lot of real estate, and describe such tract of land with sufficient accuracy to enable the Sheriff to execute a deed therefor, we cannot render a judgment for the plaintiff in this case. This condition of affairs renders it unnecessary to determine whether the original assessment was valid, or whether the raise in value by the Board of Equalization was or was not valid.

FLETCHER M. DOAN,
Trial Judge."

The Opinion of the Supreme Court of Arizona.

The cause having been appealed to the Supreme Court, the unanimous opinion of the Court, affirming the judgment of the District Court, was delivered by Judge Lewis. This opinion, omitting the detailed statement of facts, is as follows:

"The description of the sixty-five patented mining claims of the appellee, as found upon the original assessment roll, was sufficient. The statute then in force (Par. 2652, R. S. 1887) provides:

" 'It shall be the duty of the assessor to prepare a tax list or assessment roll, * * * in which book or books he shall set down in separate columns; * * *

" 'Second. All real estate taxable to each inhabitant, firm, incorporated company or association, described by metes and bounds, or by common designation or name, if situated within the limits of any city or any incorporated town, describing by lots, or fractions of lots; if without said limits, giving the number of acres as nearly as can conveniently be ascertained, and the location and township where situate; all improvements upon public lands, describing as nearly as possible the location of such improvements; * * *

" 'Sixth. The total value of all property taxable to each, * * * and the description of real estate shall be sufficient if the same can be readily identified thereby.'

"The name of a mining claim is a 'common designation or name' within the meaning of the statute. By such name the real estate may be 'readily identified'. There can be no valid location of a mining claim without the selection of a name therefor. The name must be inserted in the location notice, is inserted in the patent, and the

notice and patent made a matter of public record. The practice of assessing patented mines by name has obtained too long in this territory to be now questioned. This mode of assessment is a practical construction of the statute of which we may take judicial notice and is of weight in the determination of the validity of an assessment so made.

Copper Queen Mining Co. v. Territory, 9 Ariz. 383.

"The appellee was entitled to a separate assessment of its property in tracts or parcels unless it waived that right by the list it returned to the assessor. The appellant contends that the appellee is estopped by the return of the property described as a single tract or parcel of land from asserting illegality in the assessment here made *en masse.*

"There is force in appellee's argument that there is no technical estoppel *in pais* pleaded or proven. Centennial, Etc., Co. v. Jaub County, Utah, 62 Pac. 1024. Yet the expression is frequently used in tax cases. Inland Lumber Co. v. Thompson (Idaho), 83 Pac. 936, and cases therein cited. The Idaho court reaches the conclusion that in tax cases there should be a liberal application of the principle of estoppel in favor of upholding and enforcing an assessment against the taxpayer. Waiver is a definite expression applicable to the action of appellee in making its list for taxing purposes. Returning its property *es masse* was a voluntary relinquishment of the known right of separate assessment. The taxpayer should not now be heard to complain. Kissimee City v. Drought, 26 Fla. 1, 7 So. 525. Nor does the fact that the list returned was not verified by the oath of the superintendent of the mining lessen its effect as such

waiver. It is, nevertheless, a voluntary statement by the appellee of the manner in which its property might be properly assessed. State *ex rel.* Smith v. Cooper, Town Clerk, 59 Wis. 666, 18 N. W. 438.

"The most important question raised upon the record is as to the validity of the action of the Board of Supervisors sitting as the Board of Equalization in raising the assessment upon eight of the group of sixty-five claims originally assessed *en masse* in amounts varying from $50,000.00 to $1,000,000.00 each.

"The action of the Board of Equalization in making this raise is disclosed by the minutes following:

" 'In the matter coming on this day regularly to be heard before the Board of Equalization pursuant to a notice heretofore served upon said company in writing, and which notice appears in the minutes of said board, and in which said notice it was proposed to change and correct the valuation of said company's property as the same appears upon said assessment roll, by adding thereto the sum of $3,464,895.00; for the reason that the sum fixed in said assessment roll appears to be too small; and this being the day and hour fixed in said notice for the hearings, and pursuant to a notice so given Walter Douglas, superintendent and agent of said company, appeared before the board in behalf of said company and made statements regarding said valuations and his arguments in reference thereto, and the board being now fully advised in the premises, finds it necessary to add to the assessed valuation of the property of said company on the assessment roll as follows, to-wit:

Silver Spray mine	$1,000,000.00
Hoisting works and improvements on said mine	50,000.00
Holbrook mine	1,000,000.00
Hoist and improvements thereon	10,000.00
Copper Queen mine	50,000.00
Copper Jack mine	50,000.00
On buildings and other improvements.	50,000.00
On Baxter mine	250,000.00
On Atlanta mine	250,000.00
On Dividend mine	350,000.00
On Rucker mine	200,000.00
Stock of merchandise in C. Q. store and warehouses	203,520.00
Surveying instruments	375.00
Horses	400.00
Assaying outfit	600.00
Or a total valuation of	$3,464,895.00"

"Paragraph 2654 of the Revised Statutes of 1887 provides:

"'* * * The Board of Equalization shall have power to determine whether the assessed value of any property is too small or too great, and may change and correct any valuation, either by adding thereto or deducting therefrom if the sum fixed in the assessment roll be too small or great, whether said sum was fixed by the owner or the assessor; * * * and the clerk of the Board of Equalization shall note upon the assessment roll all changes made by the board. During the session of the Board of Equalization the assessor shall be present, and also any deputy whose testimony may be required, by the parties appealing to the board, and they shall have the right to make any statement touching such assessment, and producing evidence relating to questions

before the board, and the Board of Equalization shall make use of all other information that they can gain otherwise, in equalizing the assessment roll of the county, and may require the assessor to enter upon such assessment roll any other property which has not been assessed; and the assessment and equalization so made shall have the same force and effect as if made by the assessor before the delivery of the assessment roll to (by) him by (to) the clerk of the Board of Equalization. * * *'

"The raise here made was never entered upon the original assessment roll. This was a mere omission and harmless. Wallapai Mining Co. v. Territory, 9 Ariz. 373.

"The raise was first carried into the tax books by an entry upon the duplicate assessment roll as follows:

(Here follows the schedule.)

"Disregarding for the present a variation in the names of the sixty-five claims, the delinquent tax roll, the back tax book and the back tax bill substantially conform to the duplicate assessment roll, except as to certain entries of payments, penalties and interest.

"It is apparent from an examination of this roll that there are in effect two assessments for the same year against each of the eight claims raised. One, an assessment commingled with that of sixty-four other claims *en bloc;* the other separate and distinct. This is no mere irregularity. The legality of the original assessment as an entirety has been sustained solely upon the ground that the property was so returned by the taxpayer. The board disregarded such return and the validity of its action must be determined under the statute alone. It might be argued successfully that had the Board of Supervisors raised the assessment

upon the group, such a raise would have been valid. But the board segregated from the group certain claims and imposed thereon an additional assessment. It is a fundamental rule of taxation in this territory that a taxpayer may pay upon any one of parcels separately assessed, discharging the lien thereon, without paying upon the remainder. Par. 2676, Revised Statutes of 1887.

"Judge Cooley says:

" 'When two parcels are owned by the same person, if the statute requires a separate assessment, obedience to the requirement is essential to the validity of the proceedings. It cannot be held in any case that it is unimportant to the taxpayer whether this requirement is complied with or not. Indeed, it is made solely for his benefit; it being wholly immaterial, so far as the interest of the state is concerned, whether separate estates are or are not separately assessed. And where a requirement has for its sole object the benefit of the taxpayer, the necessity for a compliance with it cannot be made to depend upon the circumstances of a particular case, and the opinion of a court or jury regarding the importance of obedience to it in that instance. That method of construing statutes would abolish all certainty.' Cooley on Taxation, page 735.

"By the action of which complaint is made here, the board deprived the appellee of this right. Upon the raise being made it had the legal right to determine upon which, if any, of the claims so raised, it would pay. If it determined to pay upon none, it was, nevertheless, obliged to pay a portion of the tax thereon if it exercised its right to pay upon the fifty-seven claims remaining, for the tax collector, under paragraph 2676, *supra* (re-enacted, paragraph 3900, Revised Statutes 1901), could not receive the tax upon less than the entire sixty-five

claims, that being the lease subdivision appearing on the assessment roll. If it determined to pay upon one or more of the eight so raised and to abandon the remainder, it would have to pay the tax upon the raise, together with the tax upon the entire sixty-five claims as originally assessed.

"The undisputed testimony discloses that these claims were non-contiguous in instances which would have invalidated an original assessment, except for the return. The board in raising this assessment disregarded the original classification, which has been held good as against the appellee solely by reason of its return.

"The board of supervisors, sitting as a Board of Equalization, had no power, under paragraph 2654 of the Revised Statutes of 1887, to segregate from a tract of land returned and assessed as one parcel, a portion thereof and impose thereon an additional assessment, without first determining that such tract was improperly assessed as a whole and causing such tract to be reassessed and raised in subdivisions in such manner as to preserve the right of the taxpayer to discharge the lien of taxes upon such of the several separate tracts as he might elect.

"The question here determined was neither presented nor considered in the case of County of Cochise v. Copper Queen Company, 8 Ariz. 211.

"Upon the trial of the case the Court received all evidence offered subject to the various objections made thereto. To the offers by the plaintiff of the assessment roll, the duplicate assessment roll, the delinquent assessment roll and the back tax book, the defendant objected upon the ground of a variance from the allegations of the complaint.

"The list of mining claims set forth in paragraph IV of the complaint is as follows: 'Sixty-five (65) patented mining claims near Bisbee, Ari-

zona, as follows: Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend Wedge, Ellie Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Holbrook, Howell, Harrison, Iron Monster, Little New York, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Belle, Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia.'

"Said mining claims consisting of 636 acres.

"Thus naming sixty-five claims.

"It differs from the list shown in the assessment roll in this: It names the 'Dividend Wedge', the 'Howell', the 'Belle' and the 'Isle', which are omitted from the assessment roll; and it omits the 'Dividend', the 'Wedge', the 'Powell', the 'Little Joker', the 'Sunrise' and the 'Belle Isle', all of which are included in the assessment roll; it names only sixty-five claims, whereas the assessment roll names sixty-seven.

"Disregarding the discrepancy in the naming of the Dividend Wedge and the Belle Isle as a mere matter of punctuation and the writing of Sun Rise as a compound name, the error in the names 'Howell' and 'Powell' and the mention of the Little Joker claim in the assessment list inadmissible in proof of the allegations of the complaint.

"Again the complaint differs from the list shown in the duplicate assessment roll in this: It names the 'Howell', the 'Dividend Wedge', the 'Belle'

and the 'Isle', all of which are omitted from the duplicate assessment roll; and it omits the 'Powell', the 'Dividend', the 'Wedge' and the 'Belle Isle', all of which are included in the duplicate assessment roll.

"The variance disclosed renders the roll inadmissible under the complaint.

"Again it differs from the list contained in the delinquent roll in this: It names the 'Dividend Wedge', the 'Howell' and the 'Silver Bear', all of which are omitted from the delinquent roll; and it omits the 'Dividend', the 'Wedge' and the 'Powell', all of which are included in the delinquent roll.

"The delinquent roll is therefore inadmissible.

"And, finally, the back tax book is inadmissible under the objection made, for the complaint differs from the list in the back tax book in this: It names the 'Dividend Wedge', the 'Howell', the 'Silver Bear', the 'Belle' and the 'Isle', all of which are omitted from the back tax book, and it omits the 'Dividend', the 'Wedge', the 'Powell' and the 'Belle Isle', all of which are included in the back tax book.

"The importance of the objections here considered is rendered more apparent by a consideration of the nature of the action. It is an action *quasi in rem* to fix a lien upon specific property. No personal judgment can be had.

"The statutes, Section 88, Act 92, Laws of 1903, provides:

" 'The judgment, if against the defendant, shall describe the land upon which the taxes are found to be due, shall state the amount of taxes and interest found to be due upon each tract or lot, and the year or years for which the same are due, up to the rendition thereof, and shall decree that the lien of the territory be enforced and that the real estate

or so much thereof as may be necessary to satisfy such judgment, interest and costs, be sold, and execution shall be issued thereon, which shall be executed as in other cases of judgment and execution, and said judgment shall be a first lien upon said land.'

"This statute was adopted from Missouri, and the prior construction thereof by the courts of last resort of the State of Missouri is, under well-established principles, controlling upon us. A judgment in an action to collect back taxes, differing from the complaint in the description of the property sought to be subjected to the lien of such tax is void. Milner v. Shipley (Mo. 1888), 7 S. W. 175; Vaughan v. Daniels (Mo. 1899), 11 S. W. 573; O'Day v. McDaniel (Mo. 1904, subsequent to the passage of Act No. 92), 80 S. W. 895.

"Nor is the admission of this evidence rendered harmless by the proof that an amount equivalent to the tax upon the property as originally assessed was tendered by the appellee in full payment of its tax for the purpose of bringing a suit in equity to injoin the collection of the tax upon the various raises and subsequently paid to the county in the course of suit, and credited by it upon the entire tax claimed to be due. Assuming that it was paid and accepted as a discharge of the original tax, as appellant now contends was the fact, the amount now in suit is the tax upon the raise. Without a valid original assessment there could be no raise. The fact of payment of the original tax does not dispense with the necessity of proof of an assessment admissable under the facts alleged in the complaint.

"The defendant also objected upon the ground of variance to proof of the action of the board of equalization as disclosed by the minutes of its meetings. Upon the introduction of the various

exhibits showing the separate raises of each of the eight claims therein mentioned, the defendant renewed this objection.

"To determine whether or not the variance is material, the allegations of the complaint must be examined. Paragraph four of the complaint contains the only description of the property sought to be subjected to the tax lien. So far as essential the allegation is sixty-five (65) patented mining claims near Bisbee, Arizona (then follows the list by name as hereinabove set forth), said mining claims consisting of 636 acres assessed at $3,180.00. In paragraph six appears the allegation as to the raise, namely, 'To the valuation of the patented mines and improvements $3,260,000.00.' In paragraph fourteen the pleader alleges the amount due 'all of which is a lien upon the lands and real estate owned by and assessed against said Copper Queen Consolidated Mining Company for the year 1901, as hereinabove set forth.'

"Nowhere is there a reference to the specific raise upon the eight claims against which the lien is now asserted, nor is there a further description thereof. The prayer of the complaint was originally for a foreclosure of the alleged lien against the tract of sixty-five (65) claims as an entirety. By leave of the court, subsequent to the admission of the evidence under consideration, the prayer was amended to read: 'That the said judgment and whole thereof be adjudged and decreed to be the first and paramount lien upon such of the aforesaid described lots, tracts and parcels of land and real estate as the court may, from the proof, adjudge to be subject to a lien for said taxes in favor of the territory of Arizona.' There was, however, no amendment of the allegations of fact upon which relief was sought. The complaint, therefore, alleges a raise of the sixty-five claims

en bloc. The proof of raise upon eight of the sixty-five claims, upon which alone it is now sought to foreclose the lien, is a substantial variance.

"The trial court did not err in rendering and entering judgment for the defendant. The judgment, therefore, is affirmed.

ERNEST W. LEWIS,
Associate Judge.

"We concur:

EDWARD KENT,
Chief Justice.

JOHN H. CAMPBELL,
Associate Justice.

EDWARD M. DOE,
Associate Justice."

POINTS AND AUTHORITIES.

I.

Under the repeated decisions of this Court in the exercise of its appellate jurisdiction over territorial courts, the Court will not disturb the decision of the territorial courts in a construction of revenue or other local statutes unless there is manifest error disclosed. In the case at bar the assignments of error disclose no basis for consideration under this rule.

Idaho & Oregon Land Improvement Co. v. Bradbury, 152 U. S. 509;
Fox v. Haarstick, 156 U. S. 676;
Copper Queen Mining Co. v. Arizona Board, 206 U. S. 474-477;
English v. Arizona, 214 U. S. 359;
Treat v. Grand Canon Ry. Co., 222 U. S. 449;
Strauss v. Foxworth, 34 Sup. Ct. Rep. 422;
Gila Valley G. & N. R. Co. v. Hall, 34 Sup. Ct. Rep. 229;
Work v. United Globe Mine, 34 Sup. Ct. Rep. 274;
Phoenix Railway Co. v. Landis, U. S. Adv. Ops. 1913, p. 179.

II.

Irrespective of the ground upon which the opinion of the Arizona Court was based, the judgment was clearly for the right party, as the facts found by the Court show beyond controversy an arbitrary exercise of the taxing power and the willful and intentional discrimination against the appellee, which was violative of due process of law and the equal protection of the law under the Constitution of the United States.

Raymond v. Chicago Union Traction Co., 207 U. S. 20;

Cummings v. Merchants National Bank, 101 U. S. 153;
Taylor v. N. & L. R. R. Co., 88 Fed. 354;
First National Bank of Albuquerque v. Albright, 208 U. S. 548;
Atchison, Topeka & Santa Fe Ry. v. Sullivan, 173 Fed. 466.

Under the facts found by the Court the tax was not only an intentional and arbitrary discrimination, but as to some of the property it was far in excess of their full cash value at the time.

III.

The defense of an unconstitutional discrimination was properly pleaded as a defense to this action.

Cooley on Taxation, Vol. 2, pp. 459-61;
County of Cochise v. Copper Queen Co., 71 Pac. 946.

This was the ruling in Missouri in the construction of this statute prior to its enactment in Arizona.

State *ex rel.* v. Cunningham, 153 Mo. 642;
Raymond v. Chicago Traction Co., 207 U. S. 20;
Atchison, Topeka & Santa Fe Ry. Co. v. Sullivan, 173 Fed. 456.

IV.

The decision of the Arizona Supreme Court that there was no basis in this case for the enforcement of the statutory tax lien upon real estate under the Arizona statute, was clearly sound and in accord with the prior construction of the statute in Missouri, from which it was adopted.

Arizona Back Tax Law of 1901, Mo. R. S. 1899, Sections 9302 to 9313;

State *ex rel.* Rosenblatt v. Sargeant, 76 Mo. 557;
State *ex rel.* Hays v. Snyder, 139 Mo. 549;
State *ex rel.* Rosenblatt v. Kerr, 8 Mo. App. 125;
Yeamans v. Lepp, 167 Mo. 61;
State v. Illinois and St. L. Bridge Co., 8 Mo. App. 599;
Brown v. Walker, 85 Mo. 262;
Allen v. Buckley, 94 Mo. 158;
State *ex rel.* Kertsner v. Sanford, 127 Mo. 368;
City of Jefferson v. Whipple, 71 Mo. 519;
State *ex rel.* Wyatt v. Wabash Ry., 114 Mo. 1;
State *ex rel.* Flentge v. Burroughs, 74 S. W. 610;
O'Day v. McDaniel, 171 Mo. 529;
Lowe v. Eakey, 82 Mo. 286;
Western v. Flannigan, 120 Mo. 61;
Roth v. Gabbart, 123 Mo. 21;
State *ex rel.* Ward v. Linney, 90 S. W. 844;
City of Hannibal *ex rel.* v. Bowman, 98 Mo. App. 103;
State *ex rel.* Morris v. Cunningham, 153 Mo. 642;
State *ex rel.* Hudson v. Carr, 128 Mo. 229;
Neenan v. City of St. Joseph, 126 Mo. 89;
Stewart v. Allison, 150 Mo. 343;
State *ex rel.* Lane v. Hannibal & St. Joseph Ry., 110 Mo. 265;
State v. Central Pacific Ry. Co., 25 Pac. 442 (Nev.);
Peers v. Read, 48 Pac. 897;
French v. Edwards, 13 Wallace 506;
Frazier v. Prince, 58 Pac. 751 (Okla.);
Territory of Arizona *ex rel.* v. United Verd Copper Co. (*nisi prius*);
Territory of Arizona *ex rel.* v. Gaines, 93 Pac. 281.

In states not having this peculiar plenary procedure, for judicial enforcement of tax liens, the rule is fundamental that a separate assessment of different parcels

owned by the same person is essential to the validity of a proceeding for enforcing a tax lien. This was the construction of the Nevada statute from which paragraph 3900 Arizona 1901 was taken.

See General Statutes of Nevada, Sec. 1096;
State v. Central Pacific Ry. Co. (Nevada), 25 Pac. 442;
Peers v. Reed (Nevada), 48 Pac. 897;
French v. Edwards, 13 Wallace 506;
Frazier v. Prince (Okla.), 58 Pac. 25;
Territory of Arizona, *ex rel.* Gaines, 93 Pac. 281.

A description sufficient to support a personal judgment against the owner or sustain a general lien on his property may be wholly insufficient, as in the case at bar, for a tax lien enforceable only by sale of the specific property assessed.

Black on Tax Titles, Sec. 112, p. 143;
Powers v. Bowdle (N. D.), 54 N. W. 404, 21 L. R. A. 328;
Green v. Lunt, 58 Me. 518;
1st Desty on Taxation, 564, 573;
Bidwell v. Webb, 10 Minn. 82;
Thibodaux v. Keller, 29 La. Ann. 508;
Morristown v. King, 79 Penn 669;
Pfeiffer v. Miles, 48 N. J. Law, 450;
Evans v. Newell, 18 R. I. 38;
Grisson v. Furman, 22 Fla. 581;
Dinge v. Paxton, 60 Miss. 1038;
People v. Reat, 107 Ill. 581;
Keane v. Cannovan, 21 Cal. 308;
People v. Mahoney, 55 Cal. 280;
Hayden v. Foster, 13 Pick. 492;
Bird v. Benlisa, 142 U. S. 664.

V.

There was no estoppel upon the appellee, in the fact that its manager gave a list of the sixty-five separate parcels by name in a group, which can cure the failure to show specific assessment upon the separate properties of the taxes sought to be enforced. No such estoppel was pleaded nor could one exist under the facts found.

8th Ency. Pl. & Pr., p. 7 and cit.

This was the rule settled in Missouri from which the statute was adopted.

State *ex rel.* Hudson v. Carr, 77 S. W. 544;
State v. Birch, 85 S. W. 363;
State *ex rel.* Flentge v. Burroughs, 174 Mo. 707;

See also

Centennial Eureka Mining Co. v. Jaub County (Utah), 62 Pac. 1024;
Chicago N. W. Ry. Co. v. Auditor General, 53 Mich. 79 (by Cooley, J.);
Summers v. Boyd, 48 Ohio St. 663;
Donnell Mfg. Co. v. Pawtucket, 75 Mass. 277;
Henshaw v. Bissell, 18 Wallace 271;
Powers v. Bowdle (N. D.), 54 N. W. 404, 21 L. R. A. 328;
City of Detroit v. Detroit City Ry. Co., 68 Fed. 166 (Taft, J.);
Bank of America v. Banks, 101 U. S. 140.

VI.

There is no merit in the contention made in the third assignment of error that the payment of the tax upon the personal property assessed and upon the original valuation as a basis for contesting the increased valuation in the original injunction suit and in the attempted

compromise, in any sense validated the action of the Board of Equalization for this proceeding, as these payments were in no sense an admission that the assessment was valid.

Arizona R. S. 1901, Par. 3900;
Same, Par. 3868.

It is fundamental, as declared in the Chicago Traction case, that one who contests as excessive a tax assessed against him must offer to pay what he does not claim is excessive.

VII.

There is no merit in the assignments of error warranting even their consideration on the question whether there was manifest error in this construction by a territorial court of a local statute.

This is clearly shown by the shifting position of appellant.

Baker v. Kaiser, 126 Fed., *l. c.* 319 (C. C. A., 8th Cir.);
N. Y. L. E. & W. R. R. v. Estill, 147 U. S. 591.

ARGUMENT.

I.

The "Manifest Error" Rule.

While this case was appealable to this court from the Supreme Court of Arizona, then a territory, the rule is settled by the repeated decisions of this court that in the exercise of this appellate jurisdiction, unless there is "manifest error," the Court will not disturb the decision of the territorial courts, particularly in the construction of revenue or other local statutes.

Thus, it was said in Idaho & Oregon Land Improvement Company v. Bradbury, 132 U. S. 509, that the necessary effect of the enactment of April 7, 1874, regulating the appellate jurisdiction of the court over judgments and decrees of the territorial courts, was that no judgment or decree of the highest court of a territory could be reviewed by this court in matter of fact, but only in matter of law. This is illustrated in this case by the findings of fact made by the Supreme Court of Arizona as a jurisdictional basis of this appeal. See *supra*, p. 8.

It was said in Fox v. Haarstick, 156 U. S. 679:

> "It is true that this ruling of the Supreme Court of the territory does not, even in a question of practice arising under the local law, preclude this court from reviewing as would a decision of a state Supreme Court in similar circumstances, but unless a **manifest error** be disclosed it should not feel disposed to disturb a decision of the Supreme Court of a territory construing a local statute."

In Copper Queen Min. Co. v. Arizona Board, 206 U. S. 474-477, this rule was affirmed in regard to a con-

tention between these same parties, and the construction of the Supreme Court of Arizona concerning the power of the territorial board of equalization was sustained, the Court saying that it would not disturb the decision of the Supreme Court of the territory construing a local statute unless "manifest error" appeared. In this case it appeared that the statute in question was taken almost *verbatim* from that of Colorado, just as in this case the statute construed was taken from Missouri, and the Court said that while it could not refuse to exercise its own judgment it naturally would lean toward the interpretation of a local statute adopted by the local court.

The same principle was followed in English v. Arizona, 214 U. S. 359.

This "manifest error" rule has been declared in a number of recent cases; thus, in Treat v. Grand Canon Ry. Co., 222 U. S. 449, relating also to the revenue laws of Arizona, and in Strauss v. Foxworth, at the present term, 34 Sup. Ct. Rep. 422, where, in an appeal concerning the revenue laws of the territory of New Mexico, the Court said there was no manifest wrong so as to justify the rejection of the local interpretation of the territorial statute. The same principle was announced in two other cases at the present term; thus, in Gila Valley G. & N. R. Co. v. Hall, 34 Sup. Ct. Rep., p. 229, also in Arizona case; and in Work v. United Globe Mines, 34 Sup. Ct. Rep. 274, also an Arizona case, where the Court concluded its opinion by saying:

> "Our sole purpose is to abstain from deciding a purely local question in the absence of these conditions which render it necessary for us to do so—that is, the existence of plain error of so serious a nature as to require correction at our hands."

Especially will this consideration be applied when the construction of the Territorial statute, deliberately established and followed, not only in the Territory, but in the State from which it is adopted, has been reaffirmed upon the eve of statehood.

Phoenix R. Co. v. Landis (U. S. Sup. Ct., Dec. 22, 1913).

Applying now this doctrine of the necessity of showing "manifest error" to the case at bar, we have the case of the Territorial District Court and Supreme Court concurring in the construction of a local revenue statute adopted from the State of Missouri concerning a statutory plenary proceeding for the enforcement of tax liens upon real estate. The Court held that there was a failure to show such a specific assessment of the specific property whereon the lien was sought to be foreclosed as would warrant the judicial enforcement of such lien.

While we are prepared to show that the ruling of the Court was in accord with the uniform decisions, both of Missouri and Arizona, we submit there is an utter failure of appellant to show by its assignments of error any basis whatever for this court even considering the correctness of the Court's construction of a local statute.

II.

The facts found by the Arizona court show that the tax was an intentional and arbitrary discrimination violative of due process of law and the equal protection of the law.

It is true that the judgment neither of the District Court nor the Supreme Court was based upon this ground, but this issue was made by the pleadings and the **facts found** by the Supreme Court as a jurisdictional basis of this appeal show that this contention of the defendant was **established** by the proof. The defendant in this case is not content with showing that under the "manifest error" rule there is really nothing for this Court to consider on this appeal, nor with further showing that the Arizona Court proceeded upon unassailable ground in holding that there was no valid assessment nor any basis for the enforcement of a statutory lien. They deem it their duty to go further, and to show the Court that they have invoked in good faith the protection of the Federal Constitution and the organic law of the territory, and that the tax sought to be enforced in this case was an arbitrary and intentional discrimination.

They therefore call attention at the outset to this question before considering the specific ground upon which the Arizona Court decided the case, as in the view of an appellate court the grounds of the decision are immaterial if the judgment is for the right party.

The learned Judge of the District Court of Arizona did not consider this question in his judgment as it was unnecessary for him to do so. His view of the case was stated by him at the close of the hearing as follows:

The Court said:

"The situation, as I analyze it, is this: The first question is, was there a valid assessment of this property. When that is determined, that is, if it is found that there was not a valid assessment on which a lien could be based, then the question must be determined whether the defendant by any act, or by any verified pleading filed in this cause or any prior cause, or by any statement given in to the assessor, or by any payment, has estopped itself in any manner from asserting the invalidity of this assessment. If the original assessment falls, and the defendant is not estopped in anywise, then it is plain that the raise must fall with the assessment. Until these questions are determined it will not be necessary to determine the questions of discrimination and fraud raised by the defendant in the last two paragraphs of its answer. If, however, the questions first referred to are determined in favor of the plaintiff, **then it will be necessary to determine the questions of fraud and discrimination raised by the defendant's answer.**"

The Findings of the Supreme Court of Arizona As To Discrimination.

The Arizona Supreme Court in its statement of facts, which is the jurisdictional basis of this appeal, specifically finds:

First. The tax list appeared upon its face to be verified by the oath of the superintendent of the mining company, but in fact was not so verified.

Second. A portion of the patented mining claims included in said list (of the sixty-five mining claims grouped in the assessment) are **not contiguous** to any of the others.

Third. The raise made by the County Board of Equalization in the assessment of the eight patented mining claims was not based upon any evidence as to the value of the claim so assessed and was **in fact arbitrary.**

Fourth. It was established by the uncontradicted evidence that certain of the patented mining claims which were thus assessed in value by the Board of Equalization were assessed **far in excess of their full cash value.**

Fifth. There were some 280 patented mining claims in Cochise county at the time this assessment in 1900 was made and they were and had been assessed at a uniform rate of $5.00 per acre. (The assessment sought to be enforced in this case was over $49.00 per acre!)

The Opinion in the Injunction Case.

Reference may be made at this point to the decision of the Arizona Supreme Court in the former case of County of Cochise v. Copper Queen Company, 71 Pac. 946. This was the injunction suit brought in 1901, already referred to, wherein the appellee tendered payment of the tax upon the original valuation, which was received by the county on account, but not in full. This court in its opinion in this case discussed the question of what facts a party was bound to allege and show to entitle him to equitable relief against discrimination in tax valuation, and referred to the dilemma which courts had found between the remedying of inequality on the one hand, and the disregard of the Constitutional and statutory requirements, that all property should be assessed at its full or cash value. In

other words, this court found the same difficulty which other courts have found in relieving the disproportionate valuation of a taxpayer's property when that property was itself undervalued, as compared with the full cash value required by the statute. It was conceded by the Court in its opinion that there was a difference of opinion in the courts of the country on that question, some taking "one horn of the dilemma," and denying relief where there was undervaluation, although there was a disproportionate undervaluation resulting in inequality, while other courts took the other horn of the dilemma and treated equality of taxation as the paramount consideration. Thus this court said a "**dilemma** was presented no matter what view of the law was taken," but it concluded to take the view that only the excess over the statutory requirement as to valuation should be regarded as constituting the wrong to be redressed. The Court therefore held that the findings of fact made by the District Court (see Rec. p. 135), that the action of the Board of Equalization was not based upon any information or evidence, but was taken arbitrarily and capriciously and for the purpose of imposing upon the plaintiff an unjust share of the "burden of taxation" was insufficient to sustain a decree that there should have been a finding whether in fact the patented mines were overvalued measured by the statutory rule of valuation. So judgment was reversed and the cause remanded for further hearing. As shown by the testimony, there was no further hearing, but the case was compromised under the authority assumed by the Board of Supervisors, and the action was dismissed.

This Court Has Since Taken the Other Horn of the Dilemma.

While the evidence in this case shows that the property of appellee, the mines, were overvalued, even according to the statutory standard of valuation, it is interesting to note that the Supreme Court of the United States has since this opinion in the injunction case, definitely taken the other horn of the dilemma, and has laid down the rule that whatever may be the statutory standard of valuation, **a party whose property is valued at a different rate and by a different method from that employed for others of the same class for the same year, resulting in enormous discrepancy and discrimination, is denied the due process of law and the equal protection of the laws protected by the United States' Constitution, Fourteenth Amendment, against impairment.**

This was the case of Raymond v. Chicago Union Traction Co., 207 U. S. 20, decided October 21, 1907. In that case the statute provided that valuation at the full cash value estimated at a price "which it would bring at a fair voluntary sale," and for a defined per cent of this value was taken as the assessed value. The Court held that an intentional discrimination against one or more corporations resulting in an unequal valuation as compared with others of the same class, was a denial of due process of law and equal protection of laws, although the property of complainant was also assessed below its full cash value. The Court affirmed the judgment of the court below, reported in 114 Fed. 557, in what are known as the celebrated Chicago Traction cases.

The Judge of the Circuit Court in this Chicago Trac-

tion case, which was affirmed by the Supreme Court, first ascertained the cash value of the property, then deducted 30 per cent so as to equalize the value with the assessment standard adopted throughout the State. The Court said in this case there was no evidence of fraud in the sense of corruption, but there was evidence of an intentional discrimination in valuation resulting in a substantial inequality in taxation, and that, it was said by both the Circuit and the Supreme Court, resulted in a denial of due process of law. The opinion of the Supreme Court in this case cited and followed the case of Cumings v. Merchants' National Bank, 101 U. S. 153, which was referred to by this Court in its opinion in the injunction case. The same view of the law was taken by the United States Court of Appeals upon the Eighth Circuit. (See Railroad Co. v. Republic County, 67 Fed. 411). By Justice Field on the Circuit in the California railroad case, 18 Fed. 385, and notably in an exhaustive opinion by Taft, J., then on the Circuit in the United States Court of Appeals, Seventh Circuit, in Taylor v. N. & L. R. R. Co., 88 Fed. 354, affirming 85 Fed. 302 and 86 Fed. 168.

We submit, therefore, that this Court has now taken the other horn of the dilemma, and that **equality, i. e., uniformity,** is the paramount test, and if the property of a taxpayer is intentionally, willfully overvalued, as compared with the uniform standard adopted in the case of other taxpayers of the same class, he is entitled to equitable relief, and to assert his equitable defense when the State attempts to enforce the tax lien against his property.

The Facts In This Case Undisputed Under Both Standards.

But under the facts found by the Court in this case, the distinction between the two horns of the dilemma, referred to by the Court in its opinion in the injunction case, becomes academic for the reason that it is established by the uncontroverted testimony and so found by the Arizona Supreme Court, as the basis of this appeal, that not only was the property of appellee overvalued as compared with the other patented mines, or rather with the uniform standard adopted for the other patented mines, but that as to some of the mines it was far in **excess of their full cash value at the time.**

It will be observed that paragraphs 20 and 21, presenting this issue of an unlawful and unconstitutional discrimination, are based upon the two horns of the dilemma which we have discussed. Paragraph 20 (Rec. p. 3) takes the horn of the dilemma taken by the Supreme Court in the Chicago Traction case cited, *supra*, and asserts that in view of the recognized uncertainty of determining the cash value of mining properties, the custom had been established in Cochise and other counties, of fixing the cash value of mining claims at a uniform rate of $5.00 per acre, and that this custom was not occasional, but **habitual**, and that a departure from this uniform rule of valuation by the Board of Equalization in the case of the mines of appellee was intentional and for the purpose of placing upon the defendant an unequal burden of taxation, compared with other owners of the same class of property. A comparison of this allegation of paragraph 20 with the rule of the Supreme Court in the Chicago Traction case, and in the same case by the Circuit Court, and in the ruling of Judge Taft in the Tennessee case, will

show that it is in exact conformity with what is declared in those cases to be a **wrongful and unconstitutional discrimination.**

These averments were established by the uncontroverted testimony not only of Mr. Douglas and of the Assessor, but the members of the Board of Equalization; and it is so found by the Arizona Supreme Court in its statement of facts.

Paragraph 21.

But paragraph 21 goes beyond paragraph 20 and makes exactly the averment which the Arizona Court declared in the injunction case, 71 Pac. 946, ought to be made in order to establish a case of actionable discrimination. Thus it is averred (see p. 5), "not only was this attempted increase unlawful and fraudulent, in that it was made for the purpose of discriminating against the defendant, and of making it bear an unequal burden of taxation as compared with residents of the county and owners of the same class of property, but it was also illegal and void in that the valuation thus placed **was in excess of the then cash value of said properties** and according to the standard fixed by the "laws of Arizona and was excessive and an overvaluation of said properties." This averment is in exact accordance with what this court declared in the Raymond case should be made; and the decree in the injunction case was reversed by the Arizona Court because these averments were not made therein. In this case they were not only made, but, according to the direct finding of the Supreme Court of Arizona, were **proved.** The difficulty, therefore, is not found in this case which is found in many where tax valuations are called in question, of proving allegations in regard to unlawful discrimination. Here the facts establish-

ing such discrimination are found by the Court to have been proved. It therefore follows that the allegations of the willful and intentional discrimination against the appellee are established as alleged and the increased assessment should therefore have been adjudged void as violative of due process of law and of the equal protection of the law.

The Fourteenth Amendment and Taxation Discrimination.

It is too well settled to need elaborate argument or citation that corporations are persons within the meaning of the Fourteenth Amendment, and therefore, entitled to the protection of that amendment relating to due process of law and the equal protection of the law in taxation and in tax procedure.

The point is so clear that this Court declined to hear argument upon it.

See Santa Clara County v. Pac. Ry., 118 U. S. 394.

This has been affirmed in many cases since that time. It is true that the protection of the amendment is extended specifically against State action, and Congress in the exercise of its power to organize and govern the Territories, combines Federal and State authority. But it is also true, as declared by this Court in the Mormon case, 136 U. S. 1, that Congress in legislating for the Territories would be subject to the fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, so this limitation would exist rather by inference, and the general spirit of the Constitution from which Congress derives all its powers than by any express or direct application of this provision.

The Organic Law of the Territory.

The fundamental protection afforded by the Fourteenth Amendment is in effect declared in the bill of rights of Arizona, which provides in Sec. 14 that no person shall be deprived of life, liberty or property without due process of law. The Revised Statutes of the United States, constituting the organic laws of the territory, specifically provides, Sec. 1851 R. S. U. S., that the legislative power of the territory extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.

> "But no law shall be passed interfering with the primary disposal of the soil. No tax shall be imposed upon the property of the United States, nor **shall the lands or other property of non-residents be taxed higher than the property of residents.**"

It is suggested that this inhibition extends only to the legislative power, but it is obvious that the only power tax officials can exercise is by virtue of legislation. If the Legislature cannot empower them to discriminate they certainly cannot discriminate in the exercise of the territorial power of taxation without any legislative authority.

In this connection it should be said that it was admitted that the appellee was a corporation organized under the laws of the State of New York, and was therefore a non-resident within the meaning of the organic law.

The So-called Equalization Void.

It therefore follows that under the facts specially found by the Arizona Supreme Court, the so-called equalization made by the Board of Supervisors of

Cochise County, which is the sole basis of the attempted recovery in this case, was not only an intentional discrimination against the appellee, placing upon it an unequal burden as compared with others in the same class, but was also violative of the Constitution of the United States and of the organic law of the Territory under the standard fixed by the Arizona Court in the former case, in that this valuation was in excess of the then cash value of the property.

It is therefore submitted that this attempted raise of the assessment was void and for that reason, irrespective of other questions, the judgment should be affirmed.

III.

The Defense of Unconstitutional Discrimination Properly Pleaded.

It was assumed by both the District Court and by the Supreme Court of Arizona that the defenses of unlawful discrimination were properly pleaded as a defense to this statutory action; and, as we have shown, the Supreme Court has specially included in its findings the facts showing this unlawful discrimination. The Court, however, found it unnecessary to consider this question as it gave judgment in favor of defendant upon other grounds.

Under the Arizona Code an equitable defense may always be interposed in an action at law.

Equity will always relieve against a tax founded on a fraudulent assessment. If the assessment is purposely made too high through prejudice or reckless disregard of duty in opposition to what must be necessarily the judgment of all competent persons, or through the adoption of a rule which is designed to operate unequally upon the class, and to violate the constitutional rule of uniformity, the case is a plain one for equitable relief.

Cooley on Taxation, Vol. 2, pp. 459-61.

This was in effect the holding of the Arizona Court in the case of County of Cochise v. Copper Queen Co., 71 Pac. 946. And the Missouri Supreme Court, construing this very statute before its enactment in Arizona in the case of State *ex rel.* v. Cunningham, 153 Mo. 642, 55 S. W. 249, in February, 1900, in a suit on a tax bill, quoted the language of Judge Cooley that the purpose of equalization was to bring the assess-

ment of different parts of a taxing district to the same relative standard, so that no one would bear a disproportionate part of the tax, and held that the defendant had a right to show that the board acted fraudulently and could plead facts entitling him to equitable relief against such fraudulent action of the board of equalization the same as if he had taken the initiative in a court of equity.

See also State *ex rel.* v. Merchants Bank, 160 Mo. 640; 61 S. W. 678.

There is no merit in the contention that appellee could have appealed from an excessive valuation to the District Court.

The matter of unjust discrimination set up in paragraphs 20 and 21 of defendant's answer and the facts found, not only by the Court on the hearing of the original injunction case, but also by the Supreme Court in its finding of facts in this case, to the effect that the increase by the Board of Equalization in the eight claims was not based upon any information or evidence had or obtained by them, and was taken arbitrarily and capriciously and for the purpose of imposing upon this appellee an unjust share of the burden of taxation, being a matter cognizable in equity, could not have been put in issue under an appeal from the action of the Board of Equalization as provided by Par. 3875 R. S. 1901. The only issue triable under said paragraph was the actual cash value of the property lawfully fixed by the Board of Equalization acting within its jurisdiction. The statute gives no authority to the District Court, under this section, to try the issue of fraud or the matter of insufficiency of description. This is left to a court of equity, and this question was

so determined in the Copper Queen case in 71 Pac. 946; and furthermore the whole question is set at rest in the case of Raymond v. Chicago Traction Company, 207 U. S. 20, where the court held that an intentional discrimination against one or more corporations resulting in an unequal valuation as compared with others of the same class, was a denial of due process of law and equal protection of the law, although the property of complainant was assessed below its full cash value.

In Atchison, Topeka & Santa Fe Ry. Co. v. Sullivan, 173 Fed. 456, this question is discussed at length by Judge Sanborn, of the Circuit Court of Appeals, Eighth Circuit, where Judge Sanborn, writing the opinion, says, page 461:

> "These facts leave no doubt that the taxing officers of Bent County adopted a rule pursuant to which they systematically and intentionally grossly under assessed the property of that county within their jurisdiction, with the legal intent unlawfully to diminish the burden of taxation upon property in that county other than railroad property; and to increase the burden upon the railroad property; and if this were the whole case, the complainant would be entitled to relief from the unlawful portion of this burden. A systematic and intentional under or over-assessment of one or more classes of property in violation of law, whereby one or more classes of property is to be made to bear an undue portion of the burden of taxation, presents a good cause of action for relief from the payment of the unjust part of the proposed tax."

This case came to the Circuit Court of Appeals from the State of Colorado, which state has a law in all par-

ticulars like that of section 3875, a part of which is commonly called the "Andrews Law." This statute in Colorado is found in the Laws of 1902, Extra Session, at pages 92 and 146. It provides for an appeal from the Board of Equalization to the District Court and requires prepayment of the tax as a condition precedent to the appeal, and also provides that where there is an over-valuation the sum unjustly collected shall be repaid to the taxpayer. Counsel for the defendant cited this statute and relied upon it, and Judge Sanborn, speaking of the matter at page 470 (173 Fed. 470), says:

> "Counsel cited the statute of Colorado, which provides that the Board of County Commissioners shall refund all taxes paid by any person which are afterwards found to be erroneous or illegal, and contend that the complainant has an adequate remedy by an action at law based upon this statute. Conceding, without deciding, that it might maintain such an action to recover back the illegal portion of the tax against its property, is that remedy as adequate as the injunction of the court below? The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt and efficient to attain the ends of justice as a remedy in equity. The facts and the law in this case have been ably presented to and carefully considered by two courts, and all the material issues in it have been determined. The complainant now has, and it is entitled to keep, the $3580 requisite to pay the illegal portion of its tax. An injunction in this suit will enable it to retain it and will end this controversy here. In order to obtain any adequate relief at law, it must pay over this $3580 to the defendant, must bring, try and prosecute to judgment an action at law against the county to recover it back, must

possibly, it may be probably, come again to this court for review of that trial, and then possibly, perhaps probably, prosecute a petition for a *mandamus* to compel the levy of taxes to pay the judgment it shall recover, and after all this it will never secure more than a part of the actual expenses it will necessarily incur in prosecuting its action at law. The proposed remedy is neither as prompt, nor as certain, nor as complete as the relief which may be granted through this suit in equity."

IV.

The decision of the Arizona Supreme Court that there was no basis in this case for the enforcement of the statutory tax lien upon real estate under the Arizona statute was clearly right and in accord with the prior construction of the statute.

Irrespective of the invalidity of the alleged increase upon the facts found by the Arizona Supreme Court as grossly discriminatory and arbitrary, it is also true that the Arizona Court proceeded upon unassailable ground in its holding that there was no basis in this case for the enforcement of the statutory tax lien. It must be borne in mind that the Arizona statute following that of Missouri makes no provision for a personal judgment against the owner on account of any taxes assessed against real estate. This case is not a proceeding against the defendant for a personal judgment on account of taxes. On the contrary the statute provides for a **lien** upon the specific property assessed and for the enforcement of that lien only by the sale of the specific lot or tract covered by the lien. As said by the Arizona Supreme Court in its opinion, "this Arizona statute was adopted from Missouri, and the prior con-

struction thereof by the Missouri courts was held to be controlling in Arizona." This procedure consists in the enforcement of the state's lien for taxes by ordinary civil action, the title of the owner and of all interested in the title being foreclosed by the plenary judicial proceeding in which every one interested in the title must be duly served by ordinary process if a resident or by publication as in other cases if a non-resident. This procedure seems to have been original in Missouri, where it was adopted in 1877, although some of its features may have been taken from the Texas statute adopted in 1873. Such a statutory suit for the delinquent taxes is directed solely against the property charged with the taxes and no personal judgment can be rendered against the owner although he is personally served with process nor is the judgment a lien against his other property; nor can any execution be issued except against the property charged with the tax. It was said by the Supreme Court of Missouri that a lien of a tax judgment is analogous to that of a mortgage foreclosure suit.

The statute under which this action is brought to enforce the state lien for taxes on specific property is the Arizona Back Tax law of 1901 (see 79 R. S. 1901 Ariz. as amended by acts of 1903, page 148) and is in substance the same as the Missouri Back Tax law originally enacted in 1877, the said act being carried into the Missouri revision of 1899 as sections 9302 to 9313. The Arizona Supreme Court found that this statute was adopted from Missouri and it was ruled that under excepted principles of construction the prior construction thereof by the Missouri Supreme Court was presumably adopted with the statute.

The Missouri Construction of the Statutory Procedure.

According to the repeated decisions of the Missouri courts, rendered prior to the adoption of this statute in Arizona, and constituting therefore the construction for Arizona, the procedure under this statute is solely for the collection of delinquent taxes on **real estate** and for the enforcement of the State's lien for the tax **upon each specific parcel of property,** and therefore requires a **specific original assessment of each parcel sufficiently definite for the enforcement of the State's lien thereon.** Any attempted grouping of parcels in the assessment renders it void, so far as the enforcement of this remedy is concerned.

We group below under appropriate heads the Missouri decisions under the various provisions of this statute.

The revenue laws provide separate and distinct remedies for the collection of taxes due upon personal property and taxes due upon real estate, and Act 92, which is copied verbatim from the laws of Missouri, has reference only to the collection of taxes due upon the latter.

That the revenue act of 1877 provides for no personal judgment against the owner but only for a judgment enforcing the tax lien against the **land.**

State *ex rel.* Rosenblatt v. Sargent, 76 Mo. 557.

There are two different methods provided by statute for the collection of taxes against real estate: One by suit to enforce the State's lien against the land; the other to distrain personal property for all taxes.

No personal judgment can be rendered against the taxpayer for taxes against his land, since such mode of collection is excluded by Rev. St. 1889, Pars. 7681-7684,

7608, providing for the collection of such taxes by a suit to enforce the state's lien against the land, or by distraining personal property for "all taxes."

State *ex rel.* Hayes v. Snyder, 41 S. W. 216, 139 Mo. 549.

The Assessor must list, assess and value each tract or lot of real estate separately for taxation, and an assessment and valuation of several separate tracts or lots in solido, is void, and any judgment based thereon, erroneous.

Under Missouri Sess. Acts 1877, p. 386, Par. 7, requiring each separate tract or lot to be charged with a lien, for the distinct amount of back taxes due thereon, a single judgment for the aggregate amount of charges, which aggregate was adjudged to be a lien upon all of the land collectively, was erroneous.

State *ex rel.* Rosenblatt v. Kerr, 8 Mo. App. 125.

Mo. Rev. St. 1879, Par. 6853, provides that each lot shall be chargeable with its own taxes, no matter who the owner is. Section 6838 declares that the judgment for back taxes shall describe the land on which the taxes are found to be due, together with the amount of tax and interest on each lot. In a suit for back taxes the judgment directed that each lot, or so much thereof as might be necessary, should be sold for its own taxes, interest and costs. The execution commanded a levy on the property described, or so much thereof, as might be necessary to pay the judgment, interest and costs. *Held*, that the execution could not be construed to authorize the Sheriff to sell only as many of the lots as should be necessary to pay the taxes on all of the lots, but merely authorized the Sheriff to sell only so

much of each lot as might be necessary to pay the taxes, interest and costs adjudged severally against the same.

State *ex rel.* Rosenblatt v. Sargent, 76 Mo. 557.

A decree, ordering the sale of land for back taxes, which enumerates the lots to be sold, making a separate finding as to taxes against each lot, and rendering a judgment against each lot separately, and ordering that the real estate, or so much thereof as may be necessary to satisfy the judgment, be sold according to law, does not mean that the sale must proceed only until any of the lot or lots had brought the amount of the entire tax upon all the lots, but is a separate judgment against each lot for its own burden of taxes within Rev. St. Par. 6836, which requires the judgment to state the amount of the taxes, etc., found to be due on each tract or lot.

State *ex rel.* Rosenblatt v. Sargeant, 12 Mo. App. 228.

Where an execution, issued on a judgment for back taxes on several lots, is special, and directs the sheriff to sell each for the amount adjudged to be due thereon, each stood charged for a separate and distinct amount, and one lot could not be made to pay any part of the amount due on the others.

State *ex rel.* Beckwith v. Finn, 100 Mo. 429; 13 S. W. 712.

Where several tracts of land are properly assessed separately, the sale of all in bulk for the total of all the taxes is invalid, being in contravention of Rev. St. 1889, Par. 7703, charging each tract with its own taxes.

Yeamans v. Lepp, 66 S. W. 957, 167 Mo. 61.

See State v. Illinois & St. L. Bridge Co., 8 Mo. App. 599, memorandum, *Id.*, 9 Mo. App. 571;
See also Brown v. Walker, 11 Mo. App. 232, affirmed in 85 Mo. 262.

Under Wag. St. Par. 216, providing that several tracts may be conveyed in one tax deed, but that each tract is chargeable only with its tax, such a deed is void if it does not set out that each tract was sold separately for the tax against it.

Allen v. Buckley, 94 Mo. 158, 7 S. W. 10.

The complaint shows that the assessment of appellee's several parcels of real estate is invalid for lack of proper description, and no valid judgment declaring a lien on each tract or lot of real estate, for the amount of taxes due thereon, can be rendered because thereof.

An assessment of land as "108.78 acres fr'l, section 17, township 33, range 14," seems hardly sufficient under the requirements of Rev. St. 1889, Par. 7555.

State *ex rel.* Kertsner v. Sanford, 127 Mo. 368, 30 S. W. 112.

A petition seeking to enforce a city tax lien against "part of inlot No. 331, on the plat of said city," is fatally defective in its description of the property.

City of Jefferson v. Whipple, 71 Mo. 519.

In another case the property to be charged was described in the assessment, tax bill and petition, as "all of lots 5, 6, 7, 8 and 9, block 28," lying outside of the right-of-way, W. K. Addition No. 1. Plaintiff's witnesses testified that the lots were all cut up by railroad tracks, but whose tracks they were he could not tell. *Held*, that defendant's objection to the admission of

any evidence to support the petition should have been sustained, since the assessment and tax bill were too uncertain.

State *ex rel.* Wyatt v. Wabash Railroad Company, 114 Mo. 1, 21 S. W. 26.

Rev. St. 1899, Par. 7555, requires the third column of the assessment book of the county assessor to contain an accurate description of the land, etc. Section 7552 provides that each assessment of real estate so made shall be made the basis of taxation on the same for two years next succeeding. *Held*, that a correct description of the land is essential to a valid assessment.

The fact that the **petition** in an action to enforce back taxes correctly describes the land does not validate or cure the defective description of the land in the back tax bill.

State *ex rel.* Flentge v. Burroughs, 74 S. W. 610; 174 Mo. 700.

A petition for the sale of land for taxes, with no other description of the property than "Tract 1, West End Add. Und. ½ int. in lots 73-74 and 75" in a certain county and state, is insufficient to support a judgment collaterally attacked.

O'Day v. McDaniel, 80 S. W. 895, 181 Mo. 529.

Under Wag. St. p. 1212, Par. 240, authorizing the use of initial letters to designate township, range, lot, block and the cardinal points of the compass, a tax deed describing the land as "N. W. N. E. N. U. R.," meaning a part of the N. W. quarter of the N. E. quarter north of Union Road in a certain section, is fatally

uncertain. And the description in a tax deed must conform to that contained in all anterior proceedings.

Lowe v. Ekey, 82 Mo. 286.

A tax deed describing the land conveyed as "two acres in the N. W. ¼ of section 6, township 49, range 33, the property of L." is fatally defective.

Western v. Flannagan, 120 Mo. 61, 25 S. W. 531.

A tax deed which describes the property as the "north forty-six and two-thirds feet of lots one to five," is void for uncertainty.

Roth v. Gabbert, 123 Mo. 21, 27 S. W. 528.

An assessment describing the land as .75 of an acre in a certain 40-acre tract is invalid for insufficiency of description, and where an assessment was invalid because not adequately describing the land assessed, the fact that the **petition** in a suit to enforce the lien for taxes correctly described the land did not validate the defective assessment and tax bill.

State *ex rel.* Ward v. Linney (Mo.), 90 S. W. 844.

If the Assessment Is Void, the Tax Is Void.

The assessment is the basis for the tax, and if the assessment is void it necessarily follows that the tax is also void.

City of Hannibal *ex rel.* Bassen v. Bowman, 98 Mo. App. 103, 71 S. W. 1122.

An assessment of lands for taxes founded upon an assessment which is invalid, a tax sale and deed based upon such invalid assessment are void.

Pike v. Martindale, 91 Mo. 268; 1 S. W. 858.

Though in a suit to collect a tax the tax bill is

prima facie evidence of its validity, it is not conclusive, and the defendant may show that it is not based upon a valid assessment.

State *ex rel.* Morris v. Cunningham, 55 S. W. 249, 153 Mo. 642.

A valid assessment is essential to a valid tax.

State *ex rel.* Ward v. Linney (Mo.), 90 S. W. 844.

The lists returned by the taxpayer to the Assessor are mere memoranda to enable the Assessor to discover and properly assess the property, and neither the tax payer or the Assessor are bound thereby.

The list of property, whether made by the taxpayer or the assessor, is a memorandum merely for the personal use of the assessor in making up the assessment book and is not evidence in a suit for the collection of taxes assessed.

State *ex rel.* Hudson v. Carr, 178 Mo. 229; 77 S. W. 543.

The assessment lists are mere preliminary memoranda for the assessor's use and not evidence in a suit for the collection of taxes, but the primary evidence is the tax book.

State *ex rel.* Musser v. Birch (Mo.), 85 S. W. 361.

Under Act 92 no personal judgment can be obtained, even though the defendant is served and appears, the action for collection of back taxes under said act being strictly a statutory proceeding in rem.

A judgment in a statutory proceeding for taxes is strictly *in rem*, not *in personam*.

Neenan v. City of St. Joseph, 28 S. W. 963, 126 Mo. 89.

The revenue act of 1877 provides for no personal judgment against owners for back taxes, but only for a judgment enforcing the tax lien against the land.

State *ex rel.* Rosenblatt v. Sargeant, 76 Mo. 557.

In suits for the collection of delinquent taxes against land there can be no personal judgment against the owner, even where there is a personal service.

Stewart v. Allison, 150 Mo. 343, 51 S. W. 712.

The taxpayer is not estopped to deny the validity of a tax by having tendered the amount supposed to be due.

A person is not estopped to deny the validity of a tax levy by having tendered the amount he supposed justly due.

State *ex rel.* Lane v. Hannibal & St. J. R. Co., 110 Mo. 265, 19 S. W. 816.

The assessment and collection of taxes can only be made as provided by statute.

An assessor can only proceed at the time and in the manner pointed out by statute, and to justify his assessment he must be able to show the statute that gives him the authority to make it.

City of Hannibal *ex rel.* Bassen v. Bowman, 98 Mo. App. 103, 71 S. W. 1122.

Arizona Decisions and Statutes.

The decisions under the Arizona statute are in harmony with the foregoing Missouri decisions.

That a separate assessment of each tract or lot of land is essential to a valid assessment in Arizona, is made manifest by reading the provisions of paragraph 3900, R. S. Ariz., 1901, which reads:

"Whenever any tax is paid to the tax collector, he shall mark the word 'paid' and the date of the payment in the duplicate assessment roll, opposite the name of the person or description of the property liable for such tax, and shall give a receipt therefor specifying the amount of the assessment, the amount of the tax, the amount paid, date of payment, description of the property assessed, **with sufficient certainty to identify it,** and the year for which the tax was assessed; but **no tax collector shall receive any taxes on real estate for any portion less than the least subdivision entered on the assessment roll.**"

This paragraph of the Arizona statute was adopted bodily from the general statutes of Nevada, Sec. 1096. It has been construed in the case of State v. Central Pac. Ry. Co., 25 Pac. 442, and again in Peers v. Reed, 48 Pac. 897, in which latter case the court says:

"The lands being separate and distinct parcels should have been valued and assessed separately. Not being so valued and assessed, the assessment under the authorities is void. In State v. C. P. R. R. Co., 21 Nev. 105, 25 Pac. 442, this court held that a taxpayer can, under our statute (Gen. Stat. Sec. 1096), pay the taxes upon some sub-divisions of his property entered upon the assessment roll, and not on all, and that it is the duty of the assessor to value each subdivision separately. Evidently the requirement that separate and distinct pieces of land shall be valued and assessed separately is for the benefit of the taxpayer. In Cooley on Taxation (page 280) the author says: 'When the two parcels are owned by the same person, if the statute requires a separate assessment, obedience to the requirement is essential to the validity of the proceeding.'"

The leading case from this Court on this subject, which is referred to by Judge Sloan in one of his decisions, is the case of French v. Edwards, 13 Wall. 506, 20 L. Ed. 702, being a tax case in which Justice Field rendered the opinion. The court in the French case says:

> "There are undoubtedly many statutory requisitions intended for the guide of the officers in the conduct of business devolved upon them which do not limit their power or render its exercise in disregard of the said requisitions ineffectual. Such generally are the regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory, but mandatory. They must be followed or the acts done will be invalid."

The reason of that rule is quite fully gone into with a full citation of authorities in the case of Frazier v. Prince, 58 Pac. 751 (Okla.).

In the case of Territory of Arizona *ex rel.* v. United Verde Copper Co., a *nisi prius* decision by Judge Sloan, rendered November 9, 1908, he says in his opinion filed:

> "The assessment is fatally defective as to certain items. Our statutes are certain and clear as to

the manner in which the real estate shall be assessed. It must be described in such a way as that a sale made in a suit to foreclose the lien for taxes will be effective to pass a good title. Improvements on each tract, though separately assessed, must be described with particularity, so that the tracts on which they appear may be definitely ascertained. (Paragraphs 3849, 3861, 3862, 3863 and 3884, R. S. See also French v. Edwards, 13 Wall. 511; Bird v. Benlisa, 142 U. S. 664.) In the assessment before us we find certain items manifestly improvements on real estate, and therefore presumptively real estate, set down among items of personal property. These are described as 'plants', 'buildings', 'company dwellings', 'Masonic Hall', 'hospital', 'new hotel'. No other description is given. Manifestly this attempted assessment violates in essential particulars of our revenue code and is void, and as no lien has attached no valid judgment can, under the law, be entered against the property thus inadequately described and assessed."

In a tax proceeding, which is strictly *in invitum*, the description ought to be as certain and definite as is required in judgments, grants and conveyances, otherwise it would be vague and insufficient. Paragraph 3249, R. S. Ariz., sets forth the minimum description by which a mining **claim** may be conveyed. It is as follows:

"(3249, Sec. 19.) In all actions, judgments, grants or conveyances it shall be a sufficient description of a mining claim if it can be intelligently learned therefrom the name of the claim, the district, county and territory where it is situate, and the book and page where the location notice thereof is recorded."

A description in a tax proceeding which does not measure up to this statute is certainly too indefinite to establish a tax lien.

Board of Equalization.

The description in the raise by the Board of Equalization is as indefinite and vague as the assessment.

By referring to pages 258-9 of the record (Folio 772-4), it will be seen that the Board of Equalization made the following order:

> "The Board being now fully advised in the premises finds it necessary to add to the assessed valuation of the property of said Company on the assessment roll as follows, to-wit:
>
> | | |
> |---|---|
> | Silver Spray Mine | $1,000,000 |
> | Hoisting works and improvements | 50,000 |
> | Holbrook Mine | 1,000,000 |
> | Hoisting and improvements thereon | 10,000 |
> | Connor Queen | 50,000 |
> | Copper Jack | 50,000 |
> | On buildings and other improvements | 50,000 |
> | Baxter Mine | 250,000 |
> | Atlanta Mine | 250,000 |
> | Dividend Mine | 350,000 |
> | Rucker Mine | 200,000" |

This alleged raise of the above patented mines by the Board of Equalization is just as defective, so far as the absence of a description is concerned, as the alleged original assessment. It falls exactly within the rule made in the cases which we have heretofore cited to the court. So, there are therefore two fatal objections to the petition of the complainant. The

first is that the Board of Equalization is only a **supervisory Board.** You can't raise unless you have something to raise from. If there is no valid assessment to start with there can be no valid raise made by the board; and, in the second place, the designation of the claims by their names by the said Board was just as vague and uncertain as the original assessment by the County Assessor. It will be noted that the original assessment of the 67 patented mining claims were made in bulk, or *en masse*, which appellant now contends was a legal and sufficient assessment. However, the raise by the Board of Equalization was a separate and distinct raise upon each of the several mines mentioned. The Board of Equalization treated the respective mining claims as separate and distinct lots, parcels and tracts of land, and attempted to make the raise accordingly, without having before it any separate or distinct assessments of the several mining claims to which it might add the proposed raise. Counsel in their brief in the Arizona Court at page 32 say:

> "We are only contending for the tax upon the eight claims which were raised, and about which there are no omissions, insertions or misdescriptions."

Counsel are in error in this. In the first place, these descriptions are as vague and uncertain as those contained in the original assessment. In the second place, the raise by the Board includes the "Dividend," but the complaint contains no claim by the name of "Dividend," and there is no such mine or claim in the district known as the "Dividend," or the "Dividend Wedge." (See Record, Folio 1135.)

It seems apparent if the mining claims were properly assessed *en masse*, the raise by the Board of Equalization should have been *en masse*. This is undoubtedly the position which counsel for complainant took when they prepared their complaint, for it is therein alleged:

> "That on said 17th day of July, 1901, said Copper Queen Consolidated Mining Company appeared before said Board of Equalization, and upon the hearing and consideration of said matter said Board determined to and did change and correct the valuation of said property of said Copper Queen Mining Company in said assessment roll as returned by said assessor, by adding thereto as follows:
>
> "To the valuation of patented mines and improvements, $3,260,000."

Upon the introduction of the various exhibits showing said separate raises on said mining claims, the appellee objected on the ground that the same was a variance between the allegations of the complaint and the exhibits offered. (See Rec., Folios 827-8.)

It necessarily follows from the foregoing, and from the statutes of the Territory conferring on boards of supervisors their powers to equalize taxes that they can only act upon **valid original assessments,** raising or lowering the same. Such a board cannot make an original assessment, as it is only a **supervisory board.**

> See Territory of Arizona *ex rel.* v. Gaines, 93 Pac. 281.

Decisions in other States.

Not only is the assessment in this case void, because of the defective description, under the statutes

and decisions of the courts of Arizona and Missouri, but it would be held to be insufficient and void under the decisions of the appellate courts of all the States whose statutes provide for a tax lien **only upon the specific property assessed,** and for the enforcement of that lien only by a **sale of that specific property,** even though the description might be sufficient to support a personal judgment against the owner, or to sustain a **general lien** on all the property of the owner, in States where those remedies are given.

Black on Tax Titles, Sec. 112, p. 143;
Powers v. Bowdle, 21 L. R. A. 328, 54 N. W. 404 (North Dakota);
Green v. Lunt, 58 Me. 518;
I Desty on Taxation, 564 and 573;
Bidwell v. Webb, 88 Am. Dec. 56 (10 Minn. 82);
Thibodaux v. Keller, 29 La. Ann. 508;
Morristown v. King, 79 Tenn. 669;
Pfeiffer v. Miles, 48 N. J. Law 450;
Evans v. Newell, 18 R. I. 38;
Grisson v. Furman, 22 Fla. 581;
Dingey v. Paxton, 60 Miss. 1038;
People v. Reat, 107 Ills. 581;
Keane v. Cannovan, 21 Calif. 302;
People v. Mahoney, 55 Calif. 286;
Hayden v. Foster, 13 Pick, 492.

Thus Black on Tax Titles, Sect. 112 (p. 143), says:

"But here it is to be noted that although, if the description is fatally defective, **the lien of the tax will not attach to the land,** it does not follow that the tax cannot be collected. On the contrary, **if the tax is a personal charge against the owner,** his liability to pay it **will not be affected by the escape of the land itself** through the imperfection of the description."

1 Desty on Taxation, p. 573, says:

> "Where lands are separated either by the use or purpose to which they are devoted, or by the mode of occupation, or are disconnected in location, a tax laid generally upon an entire valuation cannot be made **a lien upon each separate parcel**, even when owned or occupied by the same person."

And on page 564 he says:

> "The tax list must show with certainty what the property taxed is. The description **must be certain of itself, and not such as to require evidence aliunde to render it certain.**"

In the case of Hayden v. Foster, 13 Pick. 492, the decision is by Chief Justice Shaw, and is probably the leading case on this subject, holding, as it does, that statutes requiring the separate assessment of different lots or tracts of real estate, are mandatory.

In Green v. Lunt, 58 Maine 518, the court (per Danforth, Judge) says:

> "The R. S. (Sect. 150) provide that 'for all taxes legally assessed on real estate belonging to resident proprietors * * * a lien is hereby created which shall continue in full force until the payment thereof.' By the same section it is further provided that the collector may give notice of his intention to sell so much of said real estate as is necessary to pay said tax and charges. The collector has no authority for selling land for taxes except as given in these statutes. He can sell, such and only such as the law gives him a lien upon, and the lien attaches to such, and only such as are legally assessed, and to the specific and definite parcel upon which the tax is laid. If

there is no definite parcel taxed, there can be no lien, and if no lien there can be no legal sale. Hence the inference is irresistible, that, in the assessment which establishes the lien, and which is the foundation on which rests all subsequent proceedings, the lots **taxed must be definitely and distinctly described.** * * * **The assessment must be complete in and of itself,** as much so as a deed or contract. Parol proof may be resorted to for the purpose of applying the description contained in the assessment to the face of the earth, but no further. It cannot supply any deficiency in the buts or bounds. These must be ascertained from what is written and from that alone.

"We suppose, as contended in the argument, that the assessor intended to assess the lot or portions of the lot owned by the person taxed, or we may learn that fact from those **officers** themselves. But this is not a question of **intention, but one of fact.** What did they do? What is the specific lot upon which the tax is made? Until we can answer these questions, and from the record, we are utterly unable to ascertain the lot to which the lien attaches, and the one to be sold."

This opinion of Judge Danforth was concurred in by Justice Kent, and all of the other judges of the Supreme Court of Maine.

In the case of Keane v. Cannovan, 21 Calif., *l. c.* 299, Mr. Justice Field, then on the Supreme Court of California, in the opinion in that case, which was a proceeding to enforce a tax by the sale of the specific property assessed, used the following language in holding proceedings for the sale of the land for taxes void for uncertainty of description:

"The description must be certain of itself, and

not such as to require evidence *aliunde* to render it certain. The statute requires the collector, in his publication of the delinquent list, to give such a condensed description of the property that it may be easily known. A description which cannot be made intelligible without resort to extrinsic evidence is not of this kind. Certainty in the description is required to apprise the owner that his property is advertised for sale, and to enable him to prevent the sale by paying the taxes thereon, and to impart information to the bidder as to the actual extent and location of the premises to be sold. All subsequent proceedings depend upon this certainty. An inaccurate or uncertain description defeats every step subsequently taken, and as we have already said, the uncertainty cannot be cured by evidence *aliunde*. A description, says Blackwell, 'sufficiently clear to convey land between man and man, and which, if contained in an agreement to convey, would authorize a court of equity to decree specific performance, will **not answer in proceedings to enforce the collection of a tax.**' "

In People v. Mahoney, 55 Cal. 286 (cited by Appellant), Justice Ross says:

"A description sufficiently certain to convey land between man and man, which, if contained in an agreement to convey, would authorize a court of equity to decree a specific execution, may not answer in a proceeding to invest the collection of a tax. In the latter case the description must be certain of itself, and not such as to require evidence *aliunde* to render it certain."

In Pfeiffer v. Miles, 48 N. J. Law 450, the court said:

"The supplement of 1873, making all real estate salable for taxes, and prescribing the extent and

limit of the lien of taxes on real estate, and the mode of enforcing the same in townships contains no directions for a description of the real estate in all cases. While doubtless such a description ought, out of caution, to be given, and is **absolutely essential to the lien of the tax,** I am unable to discover that its absence will invalidate the tax or exonerate the owner from being compelled to pay the **tax by such proceedings as can be resorted to without a lien.**"

In Thibodaux v. Keller, 29 La. Ann. 508, it was held that a **tax sale** of property (in a proceeding under the Louisiana statutes to **sell the specific property** for the taxes assessed against it), was void if the **assessment** or the advertisement under which the sale was made contained no description of the property sufficiently specific to clearly identify it. That in such case the assessment stands in lieu of a judgment. It is the foundation of that which follows and must contain an accurate and sufficient description of the property, as required by the statute.

This Court has also held that vagueness of description in an assessment renders it and all subsequent proceedings thereunder absolutely null and void. Thus, in the case of Bird v. Benlisa, 142 U. S. 664, 35 Lawyers' Ed. 1151, it held an assessment void for uncertainty, which described land as follows:

Owner.	Des. of Land	Sec.	Town.	Range.	Acres.	Amount.
Mazell, Partin & Partin.	Alexander. Spring Creek Grant.	..	..	..	7,800	$1,822

It also held that inasmuch as the original assessment was void, all subsequent proceedings based thereon must necessarily be void, even though the land was cor-

rectly and fully described in such subsequent proceedings.

Text-writers have assigned the following reasons for the foregoing decisions:

> "The purpose in requiring accurate descriptions is threefold: (1) To inform the owner what property is to be sold; (2) That intending purchasers may identify it; (3) That a proper deed may be made to the vendee on the sale."
>
> Black on Tax Titles, p. 112;
> Cooley on Taxation, p. 742.

Black also quotes with approval the language of Danforth, Judge, as follows:

> "The collector can sell such and only such lands as the law gives a lien upon; and the lien attaches to such, and such only, as are legally assessed, and to the specific and definite parcel upon which the tax is laid. If there is no definite parcel taxed there can be no lien, and if no lien there can be no legal sale."
>
> Black on Tax Titles, Sec. 112;
> Danforth, Judge, in Green v. Lunt, 58 Me. 518.

In this section 112 Black also points out the distinction between a description sufficient to support a judgment against the owner and one which is sufficient to authorize a **lien upon the parcel of land assessed.**

Black, Sec. 112, p. 143.

Black points out that if the owner has returned the property, any description which he himself has given, or from which he can understand what is assessed, is sufficient **to uphold a judgment against the owner,** although it is insufficient to **create a lien against the lot attempted to be assessed.**

We have cited these decisions showing that the **assessment** in this case and *a fortiori* the **increased** assessment would be held insufficient and void in states other than Arizona and Missouri where a tax lien is sought to be enforced upon specific property assessed even though the description in the assessment might be sufficient to support a personal judgment against the owner. This distinction is fundamental. These rulings are therefore peculiarly appropriate in the present case where the proceeding is directed only against the specific property for the establishment of a specific lien. It was not a question of mere clerical error in misdescription, as counsel seem to assume in their assignment of errors, nor was it a question of merely variance between the assessment roll and the other papers, but the defect was fundamental in that the assessment was made in bulk of sixty-five different properties which were **not contiguous**, some being more than a mile apart, and it is attempted to shift from an assessment in bulk by segregating certain specific property, and raising same, when there was no specific assessment upon such parcels. We submit that the attempt to enforce a statutory lien upon specific property in such a case would be a travesty upon the whole theory of this proceeding for the enforcement of tax liens. We submit therefore that the judgment of the trial court and Supreme Court of Arizona based upon that construction of the state statute rests upon unassailable grounds.

V.

There was no estoppel in the original assessment which can be availed of in this proceeding against the appellee.

In the first place, an estoppel, in order to be availed of, must be specially pleaded.

8th Ency. Pl. & Pr., p. 7 and cit.

The complainant has not pleaded estoppel in this case, nor facts constituting an estoppel, and had the matter been plead, the act of the appellee in handing to the assessor a memorandum of its property was to aid the assessor in discovering the same and entering it upon the assessment roll by its proper description.

State *ex rel.* Hudson v. Carr, 77 S. W. 544.

The list of schedule prepared by the taxpayer is a mere memorandum and under our statute in an action to foreclose a tax lien, the same is not evidence.

State v. Birch, 85 S. W. 363.

This matter came squarely before the Court upon our statute as construed by the Supreme Court of Missouri in the case of State *ex rel.* Flentge v. Burrough, 174 Mo. 707, 74 S. W. 612.

The Court says:

> "But the record discloses that the defendant Frank E. Burrough, husband of his co-defendant, furnished the assessor lists of their property in which the land in question was described as in the tax bill (Note:—It will be observed in the case at bar the same was not described as in the tax bill); and it is insisted by plaintiff that by reason of this fact they are estopped to object to the sufficiency of that description, and cannot dispute the

validity of the assessment, nor defeat the collection of the taxes. That defendants might be estopped from denying the ownership of the land described in the tax bill, by reason of the fact that they furnished a list of their property, including the land in question, in which it was described as in the tax bill, under certain circumstances, is doubtless true, but that they are not estopped in this proceeding by reason of that fact from denying that the **description** of the land in the tax bill is too vague and uncertain upon which to base a judgment and enforce a lien against the land for taxes, is equally clear. They could not in this proceeding supply by anything they may have said or done, that which was essential to a good and valid assessment, that is, an accurate description of the land for the want of which the assessment and the tax bill are void."

Centennial Eureka Mining Co. v. Jaub County (Utah), 62 Pac. 1024, is a leading case upon the subject and goes very fully into the doctrine of estoppel in a tax proceeding, stating the rule to be that a party estopped must have, first, falsely represented or concealed a material fact; second, the false representation or the concealment must have been fraudulently made; third, the party pleading the estoppel must have been ignorant of the fact; fourth, the representation must have been with the intention that it should have been acted upon; fifth, the party pleading it must have been misled thereby. The Court says:

"Tested by the foregoing requirements, the facts in the case at bar do not constitute an estoppel. The plaintiff was not found guilty of a deception, made no misstatement and perpetrated no fraud, but simply did what he was required to do

by the assessor. As the assessor, collector and treasurer are presumed to know the extent of their authority, the statement could not mislead them."

See also Chicago N. W. Ry. Co. v. Auditor Gen., 53 Mich. 79.

The opinion in the case just cited was by Judge Cooley, in which he says:

"One is estopped from denying the truth of his own statement if his denial would mislead and prejudice another who acted in reliance thereon, but the State in collecting its revenue cannot apply the rule of estoppel to citizens who have not fully reported the necessary data for assessing them, unless the citizens are acting in fraud and evasion of the law."

See Somers v. Boyd, 48 Ohio St. 663;
Donnell Mfg. Co. v. Pawtucket, 75 Mass. 277;
Kenshaw v. Bissell, 18 Wal. 271.

In the case of Powers v. Bowdle, 54 N. W. 404, 21 L. R. A. 328 (N. Dakota), it was held that where State statutes provide that a tax shall be a lien upon the property against which it is assessed, which may be foreclosed by a sale of the specific property, and where a description in an assessment was uncertain and fatally, defective in not describing each specific parcel distinctly, it could not be rendered valid and sufficient by showing that it corresponded with a description furnished the assessor by the owner. That **the public** and bidders at tax sales, as well as the owners, are interested in the description of real estate in the tax **records and tax titles.**

The doctrine of estoppel is not applicable in a proceeding of this kind *in rem* to enforce a tax lien against a specific lot or tract of land. If the tax was a per-

sonal debt, and the proceedings were to obtain a personal judgment, it might be different, for estoppel acts upon and deals with **persons** only, and not things. The doctrine of estoppel when applied seals the lips of persons, but as inanimate objects have no lips the doctrine may not be invoked to change the status of the thing against which the proceeding *in rem* is had. The doctrine is said to create a contract against a person by implication. The doctrine is entirely one of implication, and surely a tax lien may not be created by implication or estoppel *in pais*. A tax lien may only be created by the assessor, acting strictly within his statutory authority. This is done by the assessor entering upon the assessment roll a sufficient description of the lot or tract of land assessed, and carrying out upon the assessment roll the specific amount of tax due against such lot or tract of land. The assessor is guided by, and his duty and authority is prescribed by the statute. He takes his direction solely from the statute. He is presumed to know the extent of his authority, and as against this statutory authority could not have been misled. It will be conceded, of course, that a taxpayer himself has no power to make an assessment or create a tax lien, and it is elementary that where a person has no **power** to do an act, that act or thing may not be done by implication or created by estoppel against such person. There can be no estoppel where there is no power to act. This doctrine is succinctly set out by Judge Taft in the case of City of Detroit v. Detroit City Ry. Co. (60 F. R. at page 166), in which he says:

> "The general rule is where an express mode of creating a liability against such a corporation is prescribed by the statutes, no liability can be en-

> forced and no estoppel can be raised against it on the ground of the acceptance of benefits or other conduct which would render an individual liable. The reason is that the mode of contracting prescribed, limits the power of contracting, and no implication or estoppel from circumstances can supply the want of power."

And again in Bank of America v. Banks (101 U. S. 240) the Court says:

> "In order to work an estoppel, the parties to a deed must be *sui juris* in their own right competent to make it effectual as a contract; hence, a married woman is not estopped by her covenants. Plainly the wife was not competent to purchase supplies for the plantation of the husband, and therefore cannot be estopped by these recitals."

Therefore, inasmuch as Mr. Walter Douglas, general manager of the appellee company, had no power to make a tax assessment or create a tax lien, and was not competent *sui juris* to make a tax lien effectual as a tax lien, there could be no estoppel by the return of the list. Mr. Douglas cannot supply in this proceeding, by anything he may have said or done, that which was essential to a good and valid assessment, viz, a separate and accurate description of the land by the assessor. It is claimed by the appellee that the assessment is void for insufficiency of description and because said assessments was made *en masse*. The appellant replies that, though the assessment may be void upon its face, the invalidity is cured by implication or estoppel. Let us examine this proposition. For instance: In this case, suppose the appellee had handed in a correct list of his property, fully describ-

ing it separately, and the assessor had utterly failed to enter the same upon the assessment roll (which status would then be in nowise different than a void assessment), could any one contend that there was an assessment and tax lien and then bring suit to enforce such, contending that by virtue of the fact of delivering such list to the assessor created by estoppel an assessment and a tax lien and cured the delinquency of the assessor himself? Surely not. On the other hand, supposing that the appellee had given in a list of mining claims by the names of "George Washington," "Patrick Henry," "Benjamin Franklin," etc., containing 636 acres, and no such mining claims in fact existed, and the assessor entered such names of mining claims on the assessment roll. Would the fact that the appellee handed in such list create by estoppel or implication a specific lien on any real property whatsoever? Surely not. The only way a lien may be created is by the act of the assessor, describing the property so that it may be identified **thereby**—from the description itself—and then carrying upon the assessment roll the specific amount of tax which is assessed against such separate tract of land, and anything that a taxpayer may have said or may not have said cannot add to nor detract from the duty of the assessor nor create a tax lien.

This was exactly what the Supreme Court of Missouri said in the case of State *ex rel.* Flentge v. Burrough (74 S. W. 612) in an action for back taxes under this very statute (*supra*, p. 84).

VI.

There is no merit in the contention made in the third assignment of error that the payment of the tax upon the personal property and upon the original valuation as a basis for contesting the increased valuation and in the attempted compromise rendered harmless the errors and omissions in the tax list and in transcribing the same from the list to books and from the books to the complaint and these payments were in no sense an admission that the original assessment was valid.

Appellant alleges in his complaint in paragraph 12 that on the 9th day of September, 1901, said Copper Queen Consolidated Mining Company paid to the tax collector on account of said taxes, in partial payment thereof, the sum of $14,133.12; and this allegation is borne out by all the evidence in the case, as is evidenced by the receipt given by the tax collector to appellee. Abs. of Rec., pp. 423-424, folios 1267-1269, where it is recited:

> "Which said amount of Fourteen Thousand One Hundred Thirty-three Dollars and Twelve Cents said company concedes to be due, and which is accepted by the county treasurer and *ex officio* tax collector on account of any moneys which may ultimately be determined as due from said company for said taxes for said year."

Said amount is entered on the duplicate assessment roll as follows: "14,133.12 paid on account;" Plaintiff's Exhibit F, the delinquent tax roll, where said amount is entered as follows: "December 9th, 1901, $14,133.12 pd. on account;" Plaintiff's Exhibit G, back tax book, where said amount is entered as follows:

"December 9th, 1901, pd. on acc't $14,133.12;" and on the back tax bill, Plaintiff's Exhibit A, the amount is entered, "Amount paid on account."

Furthermore, there is no statute by virtue of which the tax collector could have received the amount of $14,133.12 as a full payment and discharge of the tax upon the original assessment. Not only is there no statute authorizing the tax collector to receive payment, but the provisions of paragraph 3900, R. S. Ariz. 1901, expressly prohibit it. The statute is as follows:

> "3900. (Sec. 70.) Whenever any tax is paid to the collector he shall mark the word 'paid' and the date of the payment in the duplicate assessment roll opposite the name of the person or description of the property liable for such tax, and shall give a receipt therefor, specifying the amount of the assessment, the amount of the tax, the amount paid, the date of payment, description of the property assessed with sufficient certainty to identify it, and the year for which the tax was assessed; but **no tax collector shall receive any taxes on real estate for any portion less than the least subdivision entered on the assessment roll.**"

It is, therefore, shown that all that the tax collector could do would be to receive the amount tendered as a deposit or on account.

The tax lien comes into life and attaches when the assessment is entered upon the roll by the assessor; and when the Board of Equalization makes a legal raise in an assessment such raise becomes at once amalgamated and merged with the original assessment. The assessment as originally assessed by the assessor, is not a separate and distinct tax or item, after the raise, which may be segregated, dealt with, and treated

in the tax proceedings—or **paid**—as a distinct entity. There can be no two taxes and two liens, one for the original assessment, and one for the raise made by the Board of Equalization; but the tax lien for the amount of the raise depends upon and relates back to the original assessment, and has its life and virtue by reason of, and only by reason of, the **existence** of the original assessment of which it becomes a part and with which it becomes inseparably blended. The raise in an assessment draws its vitality and the only vitality it has as a tax lien because of its merger with and relation to the original existing assessment. If appellant's contention were sustained, and it should be held that the original assessment was a separate and distinct tax which could be dealt with as such in the tax proceedings and fully paid, discharged and wiped off the tax rolls, there would be nothing to which the raise could attach itself and relate back—nothing from which it could draw its life as a tax lien. The original assessment is like the leaven—it leaveneth the whole.

It follows, therefore, that under the statute, Sec. 3868, as construed by this Court in the injunction suit, the powers of the board are only supervisory. They are simply to raise or lower an existing assessment. If there is no assessment to act upon, their action is necessarily void. This was declared in the very *mandamus* suit which directed this suit to be brought. No one can assess but the assessor.

The Payment Required Under the Rules of Equity Procedure.

We came into court and sought to enjoin the raise as an illegal discrimination, and, in the course of that proceeding, tendered the original tax which we con-

ceded was just. This tender was made under the general rule of equity which was declared by the Supreme Court of the United States in the Chicago Traction case, hereafter referred to, that a man who contests a tax assessed against him as excessive must offer to pay what he does not think is excessive. This duty does not rest upon any statute, but upon the recognized principles of equity based upon considerations of public policy. The defendant, therefore, offered to pay, but he offered it only as a payment in full. It has said, we offer this now as a payment in full of all we owe. The county said, on the other hand, we will not accept this as a payment in full, but we will take it on account. Now, to say that this payment constituted an estoppel against the company from contesting this very increase which we went into a court of equity to contest would be a travesty upon equity.

VII.

There is no merit in the assignments of error warranting even their consideration on the question whether there was manifest error in this construction by a Territorial court of a local statute.

No better illustration could be afforded of the utter lack of even plausible merit in the contentions of appellant than the shifting position which counsel have been compelled to take in the assertion of this anomalous claim. We quote from the opinion of the Supreme Court, *supra*, page 35:

> "The prayer of the complaint was originally for a foreclosure of the alleged lien against the tract of sixty-five claims as an entirety. By leave of the (trial) Court subsequent to the admission of the evidence under consideration (of the raise upon the eighth claims) the prayer was amended to read, 'That the said judgment and the whole thereof be adjudged and decreed to be the first and paramount lien upon such of the above described lots, tracts and parcels of land and real estate as the Court may from the proof adjudge to be subject to a lien for said taxes in favor of the Territory of Arizona'. There was, however, no amendment of the allegations of fact upon which relief was sought."

After the judgment was rendered by the Supreme Court of Arizona the position of appellant was again shifted, as set forth in the motion for rehearing, filed as part of their brief in this case. Thus, it is said, page 23:

> "While the decision of the Court **compels us to take different ground respecting the effect of the**

raise than we have heretofore held, we are convinced by the Court's reasoning that the Board could not lawfully segregate these eight claims from the mass and raise the valuation of them separately, there having been no separate assessment."

Counsel thereupon proceeds to argue that while there could be no segregation, the raise of the value of a part was necessarily a raise of the value of the whole. As to this extraordinary contention, we can say, in the first place, that it was made for the first time when, as counsel concedes, they were convinced by the reasoning of the opinion of the Supreme Court of Arizona, and in an essentially different position from that which was the contention in the trial court and in the argument before the Supreme Court of Arizona. Such a shifting of ground is not only in violation of the settled rules of orderly appellate procedure, but is the strongest possible evidence of the lack of merit in the claim of appellant.

See Baker v. Kaiser, 126 Fed., *l. c.* 319 (C. C. A., 8th Cir.);
N. Y. L. E. & W. R. W. v. Estill, 147 U. S. 591.

But, furthermore, this new position of appellant ignores the essential basis of the decision of the Arizona court, when it said that the group assessment in this case might be sustained as against the company, and that possibly a raise of the group would be sustained. The raise was not upon the **group**, but upon **segregated parcels of the group**, and the Court said expressly that such an assessment could only be validated as a personal claim, and not as a basis for a foreclosure

preceeding depending upon the specific assessment of each parcel against which a lien is asserted.

The assignments of error have been sufficiently discussed. We have carefully examined all of the cases cited, and we find none of them that afford the remotest analogy to the facts of the case at bar. We submit, therefore, that so far from the case showing the "manifest error" which is necessary for a reversal of the judgment of a Territorial court on a non-Federal question, an examination of the record shows beyond any question that not only was the judgment of the Court sound in its construction of the local statute, but the facts found by the lower court also establish beyond question that the claim sought to be enforced was violative of fundamental constitutional guaranties invoked by appellee.

We submit the judgment should be affirmed.

Respectfully submitted,

FREDERICK N. JUDSON,
JOHN F. GREEN,
E. E. ELLENWOOD.